

UNITED STATES DEPARTMENT OF THE INTERIOR

Stewart L. Udall, *Secretary*

Frank J. Barry, *Solicitor*

**DECISIONS  
OF THE  
UNITED STATES  
DEPARTMENT OF THE INTERIOR**

Edited by  
Vera E. Burgin



**VOLUME 73**

**JANUARY-DECEMBER 1966**

**U.S. GOVERNMENT PRINTING OFFICE, WASHINGTON : 1967**

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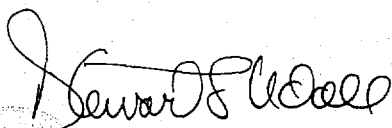
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Washington, D.C. 20402

PREFACE

This volume of Decisions of the Department of the Interior covers the period from January 1, 1966, to December 31, 1966. It includes the most important administrative decisions and legal opinions that were rendered by officials of the Department during the period.

The Honorable Stewart L. Udall served as Secretary of the Interior during the period covered by this volume; Messrs. John A. Carver and Charles F. Luce served as Under Secretary; Messrs. Harry R. Anderson, Stanley A. Cain, Frank C. DiLuzio, Kenneth Holum, J. Cordell Moore served as Assistant Secretaries of the Interior; Mr. George E. Robinson served as Deputy Assistant Secretary for Administration; Mr. Frank J. Barry served as Solicitor of the Department of the Interior and Mr. Edward Weinberg as Deputy Solicitor.

This volume will be cited within the Department of the Interior as "73 I.D."



*Secretary of the Interior*

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## ERRATA

Page 95—3d paragraph Topical Index Heading—*Contracts: Construction and Operation: Generally*, should read *Contracts: Construction and Operation: General Rules of Construction*.

Page 103—Footnote 17 *Pater Kiewit Sons' v. United States*, should read *Peter Kiewit Sons' v. United States*.

Page 138—Lines 1 and 6 *Osgood* should read *Oswood*.

Page 196—Topical Index Heading, 3d paragraph—*Contracts: Disputes and Remedies: Equitable Adjustment*, should read *Contracts: Disputes and Remedies: Equitable Adjustments*.

Page 210—1st paragraph—line 4—70 *I. D. 399*, should read 71 *I. D. 399*.

Page 325—Footnote 8—*Parker-Schram Company*, IBCA-96 (Apr. 7, 1959), 66 I.D. 142, 59-2 *BCA par. 2127*, should read 59-1 *BCA par. 2127*.



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## CUMULATIVE INDEX TO SUITS FOR JUDICIAL REVIEW OF DEPARTMENTAL DECISIONS PUBLISHED IN INTERIOR DECISIONS

The table below sets out in alphabetical order, arranged according to the last name of the first party named in the Department's decision, all the departmental decisions published in the Interior Decisions, beginning with volume 61, judicial review of which was sought by one of the parties concerned. The name of the action is listed as it appears on the court docket in each court. Where the decision of the court has been published, the citation is given; if not, the docket number and date of final action taken by the court is set out. If the court issued an opinion in a nonreported case, that fact is indicated; otherwise no opinion was written. Unless otherwise indicated, all suits were commenced in the United States District Court for the District of Columbia and, if appealed, were appealed to the United States Court of Appeals for the District of Columbia Circuit. Finally, if judicial review resulted in a further departmental decision, the departmental decision is cited. Actions shown are those taken prior to the end of the year covered by this volume.

*Adler Construction Co.*, 67 I.D. 21 (1960) (Reconsideration)

*Adler Construction Co. v. United States*, Cong. 10-60. Suit pending.

*State of Alaska, Andrew J. Kalerak, Jr.*, 73 I.D. 1 (1966)

*Andrew J. Kalerak, Jr. et al. v. Stewart L. Udall*, Civil Action No. A-35-66, in the United States District Court for the District of Alaska. Judgment for Plaintiff, October 20, 1966.

*Allied Contractors, Inc.*, 68 I.D. 145 (1961)

*Allied Contractors, Inc. v. United States*, Court of Claims No. 163-63. Suit pending.

*Leslie N. Baker et al.*, A-28454 (October 26, 1960). On reconsideration  
*Autrice C. Copeland*, 69 I.D. 1 (1962).

*Autrice Copeland Freeman v. Stewart L. Udall*, Civil Action No. 1578 Tucson, in the United States District Court for the District of Arizona. Judgment for Defendant, September 3, 1963 (opinion). Affirmed, 336 F. 2d 706 (1964). No petition.

*Max Barash, The Texas Company*, 63 I.D. 51 (1956)

*Max Barash v. Douglas McKay*, Civil Action No. 939-56. Judgment for Defendant, June 13, 1957; reversed and remanded, 256 F. 2d 714 (1958);

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*Katherine S. Foster & Brook H. Duncan, II v. Stewart L. Udall*, Civil Action No. 5258, United States District Court for the District of New Mexico, Judgment for Defendant, January 8, 1964. Reversed 335 F. 2d 828 (10th Cir. 1964). No petition.

*Sam Bergesen*, 62 I.D. 295

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*Sam Bergesen v. United States*, Civil Action No. 2044, in the United States District Court for the Western Division of Washington. Complaint dismissed, March 11, 1958. No appeal.

*BLM-045569*, 70 I.D. 231 (1963)

*New York State Natural Gas Corp. v. Stewart L. Udall*, Civil Action No. 2109-63.

*Consolidated Gas Supply Corp. v. Stewart L. Udall, et al.*, Civil Action No. 2109-63. Judgment for Defendant, September 20, 1965. Affirmed, April 28, 1966. No petition.

*Melvin A. Brown*, 69 I.D. 131 (1962)

*Melvin A. Brown v. Stewart L. Udall*, Civil Action No. 3352-62. Judgment for Defendant, September 17, 1963. Judgment reversed, 335 F. 2d 706 (1964). No petition.

*The California Company*, 66 I.D. 54 (1959)

*The California Company v. Stewart L. Udall*, Civil Action No. 980-59. Judgment for Defendant, October 24, 1960 (opinion). Affirmed, 296 F. 2d 384 (1961).

*Carson Construction Co.*, 62 I.D. 422 (1955)

*Carson Construction Co. v. United States*, Court of Claims No. 487-59. Judgment for Plaintiff, December 14, 1961. No appeal.

*Mrs. Hannah Cohen*, 70 I.D. 188 (1963)

*Hannah and Abram Cohen v. United States*, Civil Action No. 3158, United States District for the District of Rhode Island. Compromised.

*Barney R. Colson*, 70 I.D. 409 (1963)

*Barney R. Colson et al. v. Stewart L. Udall*, Civil Action No. 63-26-Civ.-Oc, United States District Court for the Middle District of Florida. Suit pending.

*Columbian Carbon Company, Merwin E. Liss*, 63 I.D. 166 (1956)

*Merwin E. Liss v. Fred A. Seaton*, Civil Action No. 3233-56. Judgment for Defendant, January 9, 1958. Appeal dismissed for want of prosecution, September 18, 1958, D.C. Cir. No. 14,647.

*Appeal of Continental Oil Company*, 68 I.D. 337 (1961)

*Continental Oil Co. v. Stewart L. Udall, et al.*, Civil Action No. 366-62. Judgment for defendant, April 29, 1966. Appeal taken.

*John C. DeArmas, Jr., P.A. McKenna*, 63 I.D. 82 (1956)

*Patrick A. McKenna v. Clarence A. Davis*, Civil Action No. 2125-56. Judgment for Defendant, June 20, 1957. Affirmed, 259 F. 2d 780 (1958). *Cert. den.*, 358 U.S. 835 (1958).

*The Dredge Corporation*, 64 I.D. 368 (1957) 65 I.D. 336 (1958)

*The Dredge Corporation v. J. Russell Penny*, Civil Action No. 475, in the United States District Court for the District of Nevada. Judgment for Defendant, September 9, 1964. Affirmed, 362 F. 2d 889 (9th Cir. 1966). No petition. See also *Dredge Co. v. Husite Co.*, 369 P. 2d 676 (1962). *Cert. den.*, 371 U.S. 821 (1962).

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*John J. Farrelly and The Fifty-One Oil Co. v. Douglas McKay*, Civil Action No. 3037-55. Judgment for Plaintiff, October 11, 1955. No appeal.

*Franco Western Oil Company et al.*, 65 I.D. 316, 427 (1958)

*Raymond J. Hansen v. Fred A. Seaton*, Civil Action No. 2810-59. Judgment for Plaintiff, August 2, 1960 (opinion). No appeal taken.

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*Stanley Garthofner, Duvall Brothers*, 67 I.D. 4 (1960)

*Stanley Garthofner v. Stewart L. Udall*, Civil Action No. 4194-60. Judgment for Plaintiff, November 27, 1961. No appeal.

*General Excavating Co.*, 67 I.D. 344 (1960)

*General Excavating Co. v. United States*, Court of Claims No. 170-62. Dismissed with prejudice December 16, 1963.

*Nelson A. Gerttula*, 64 I.D. 225 (1957)

*Nelson A. Gerttula v. Stewart L. Udall*, Civil Action No. 685-60. Judgment for Defendant, June 20, 1961; motion for rehearing denied, August 3, 1961. Affirmed, 309 F. 2d 653 (1962). No petition.

*Charles B. Gonzales et al., Western Oil Fields, Inc. et al.*, 69 I.D. 236 (1962)

*Pan American Petroleum Corp & Charles B. Gonzales v. Stewart L. Udall*, Civil Action No. 5246, United States District Court for the District of New Mexico. Judgment for Defendant, May 13, 1964. Affirmed, 352 F. 2d 32 (1965).

*Gulf Oil Corporation*, 69 I.D. 30 (1962)

*Southwestern Petroleum Corp. v. Stewart L. Udall*, Civil Action No. 2209-62. Judgment for Defendant, October 19, 1962. Affirmed, 325 F. 2d 633 (1963). No petition.

*Guthrie Electrical Construction*, 62 I.D. 280 (1955), IBCA-22 (Supp.) (March 30, 1956)

*Guthrie Electrical Construction Co. v. United States*, Court of Claims No. 129-58. Stipulation of settlement filed September 11, 1958. Compromise offer accepted and case closed October 10, 1958.

*L. H. Hagood et al.*, 65 I.D. 405 (1958)

*Edwin Still et al. v. United States*, Civil Action No. 7397, United States District Court for the District of Colorado. Compromise accepted.

*Raymond J. Hansen et al.*, 67 I.D. 362 (1960)

*Raymond J. Hansen et al. v. Stewart L. Udall*, Civil Action No. 3902-60. Judgment for Defendant, June 23, 1961. Affirmed, 304 F. 2d 944 (1962). *Cert. den.*, 371 U.S. 901 (1962).

*Robert Schulein v. Stewart L. Udall*, Civil Action No. 4131-60. Judgment for Defendant, June 23, 1961. Affirmed, 304 F. 2d 944 (1962). No petition.

*Kenneth Holt, an individual etc.*, 68 I.D. 148 (1961)

*Kenneth Holt, etc. v. United States*, Court of Claims No. 162-62. Stipulated judgment, July 2, 1965.

*Hope Natural Gas Company*, 70 I.D. 228 (1963)

*Hope Natural Gas Co. v. Stewart L. Udall*, Civil Action No. 2132-63.

*Consolidated Gas Supply Corp. v. Stewart L. Udall, et al.*, Civil Action No. 2109-63. Judgment for Defendant, September 20, 1965. Affirmed, April 28, 1966. No petition.

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*William H. Griggs v. Michael T. Solan*, Civil Action No. 3741, in the United States District Court for the District of Idaho. Stipulation for dismissal filed May 15, 1962.

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*Wallace Reed, et al. v. U.S. Department of the Interior et al.*, Civil Action No. 1-65-86, United States District Court for the District of Idaho, Southern Division. Order denying preliminary injunction, September 3, 1965. Appeal, 9th Cir., 20350, September 20, 1965. Dismissed, November 10, 1965. Suit pending.

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*Max L. Krueger v. Fred A. Seaton*, Civil Action No. 3106-58. Complaint dismissed by Plaintiff, June 22, 1959.

*W. Dalton La Rue, Sr.*, 69 I.D. 120 (1962)

*W. Dalton La Rue, Sr. v. Stewart L. Udall*, Civil Action No. 2784-62. Judgment for Defendant, March 6, 1963. Affirmed, 324 F.2d 428 (1963). *Cert. den.*, 376 U.S. 907 (1964).

*Charles Lewellen*, 70 I.D. 475 (1963)

*Bernard E. Darling v. Stewart L. Udall*, Civil Action No. 474-64. Judgment for Defendant, October 5, 1964. Appeal voluntarily dismissed March 26, 1965.

*Milton H. Lichtenwalner et al.*, 69 I.D. 71 (1962)

*Kenneth McGahan v. Stewart L. Udall*, Civil Action No. A-21-63, United States District Court for the District of Alaska. Dismissed on merits, April 24, 1964. Stipulated dismissal of appeal with prejudice, October 5, 1964.

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*Wade McNeil v. Fred A. Seaton*, Civil Action No. 648-58. Judgment for Defendant, June 5, 1959 (opinion); reversed, 281 F.2d 931 (1960). No opinion.

*Wade McNeil v. Albert K. Leonard et al.*, Civil Action No. 2226, United States District Court for the District of Montana. Dismissed, November 24, 1961 (opinion). Order, April 16, 1962.

*Wade McNeil v. Stewart L. Udall*, Civil Action No. 678-62. Judgment for Defendant, December 13, 1963 (opinion). Affirmed, 340 F.2d 801 (1964). *Cert. den.*, 381 U.S. 904 (1965).

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*Henry S. Morgan et al.*, 65 I.D. 369 (1958)

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*Paul Jarvis, Inc.*, 64 I.D. 285 (1957)

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*Peter Kiewit Sons' Company*, 72 I.D. 415

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*Harold Ladd Pierce*, 69 I.D. 14 (1962)

*Duncan Miller v. Stewart L. Udall*, Civil Action No. 1351-62. Judgment for Defendant, August 2, 1962. Affirmed, 317 F. 2d 573 (1963). No petition.

*Port Blakely Mill Company*, 71 I.D. 217 (1964)

*Port Blakely Mill Company v. United States*, Civil Action No. 6205, in the United States District Court for the Western District for Washington. Suit pending.

*Ray D. Bolander Co., Inc.*, 72 I.D. 449 (1965)

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*California Oil Company v. Secretary of the Interior*, Civil Action No. 5729, United States District Court for the District of New Mexico. Judgment for Plaintiff, January 21, 1965. No appeal.

*James K. Tallman*, 68 I.D. 256 (1961).

*James K. Tallman et al. v. Stewart L. Udall*, Civil Action No. 1852-62. Judgment for Defendant, November 1, 1962 (opinion). Reversed, 324 F. 2d 411 (1963). Petition for rehearing denied, October 16, 1963. *Cert. granted*, 376 U.S. 961 (1964). Dist. Ct. Affirmed, 380 U.S. 1 (1965). Rehearing denied, 380 U.S. 989 (1965).

*Texas Construction Co.*, 64 I.D. 97 (1957) Reconsideration denied, IBCA-73 (June 18, 1957).

*Texas Construction Co. v. United States*, Court of Claims No. 224-58. Stipulated judgment for Plaintiff, December 14, 1961.

*Estate of John Thomas, Deceased, Cayuse Allottee No. 223 and Estate of Joseph Thomas, Deceased, Umatilla Allottee No. 877*, 64 I.D. 401 (1957).

*Joe Hayes v. Fred A. Seaton, Secretary of the Interior*, Civil Action No. 859-581. On September 18, 1958, the court entered an order granting Defendant's motion for judgment on the pleadings or for summary judgment. The Plaintiffs appealed and on July 9, 1959, the decision of the District Court was affirmed, and on October 5, 1959, petition for rehearing en banc was denied, 270 F. 2d 319. A petition for a writ of certiorari was filed January 28, 1960, in the Supreme Court. Petition denied, 364 U.S. 814 (1960), rehearing denied, 364 U.S. 906 (1960).

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*Union Oil Company of California, Ramon P. Colvert*, 65 I.D. 245 (1958).

*Union Oil Company of California v. Stewart L. Udall*, Civil Action No. 3042-58. Judgment for Defendant, May 2, 1960 (opinion). Affirmed, 289 F. 2d 790 (1961). No petition.

*Union Oil Company of California, et al.*, 71 I.D. 169 (1964); 72 I.D. 313 (1965)

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*United States v. Alonzo Adams*, Civil Action No. 187-60-WM, United States District Court for the Southern District of California. Judgment for Plaintiff, January 29, 1962 (opinion). Judgment modified, 318 F. 2d 861 (1963). No petition.

*United States v. Ford M. Converse*, 72 I.D. 141 (1965)

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*Estate of Wook-Kah-Nah, Comanche Allottee No. 1927*, 65 I.D. 436 (1958)

*Thomas J. Huff, Adm. with will annexed of the Estate of Wook-Kah-Nah, Deceased, Comanche Enrolled Restricted Indian No. 1927 v. Jane Asenap, Wilfred Tabbytite, J. R. Graves, Examiner of Inheritance, Bureau of Indian Affairs, Department of the Interior of the United States of America, and Earl R. Wiseman, District Director of Internal Revenue*, Civil Action No. 8281, in the United States District Court for the Western District of Oklahoma. The court dismissed the suit as to the Examiner of Inheritance, and the Plaintiff dismissed the suit without prejudice as to the other Defendants in the case.

*Thomas J. Huff, Adm. with will annexed of the Estate of Wook-Kah-Nah v. Stewart L. Udall*, Civil Action No. 2595-60. Judgment for Defendant, June 5, 1962. Remanded, 312 F. 2d 358 (1962).

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*Hardee v. United States* (8 L.D. 391; 16 L.D. 499); overruled so far as in conflict, 29 L.D. 698.  
*Hardin, James A.* (10 L.D. 313); revoked, 14 L.D. 233.  
*Harris, James G.* (28 L.D. 90); overruled, 39 L.D. 93.  
*Harrison, Luther* (4 L.D. 179); overruled, 17 L.D. 216.  
*Harrison, W. R.* (19 L.D. 299); overruled, 33 L.D. 539.  
*Hart v. Cox* (42 L.D. 592); vacated, 260 U.S. 427. (See 49 L.D. 413.)  
*Hastings and Dakota Ry. Co. v. Christenson et al.* (22 L.D. 257); overruled, 28 L.D. 572.  
*Hausman, Peter A. C.* (37 L.D. 352); modified, 48 L.D. 629.  
*Hayden v. Jamison* (24 L.D. 403); vacated, 26 L.D. 373.  
*Haynes v. Smith* (50 L.D. 208); overruled so far as in conflict, 54 I.D. 150.  
*Heilman v. Syverson* (15 L.D. 184); overruled, 23 L.D. 119.  
*Heinzman et al. v. Letroadec's Heirs et al.* (28 L.D. 497); overruled, 38 L.D. 253.  
*Heirs of Davis* (40 L.D. 573); overruled, 46 L.D. 110.  
*Heirs of Philip Mulnix* (33 L.D. 331); overruled, 43 L.D. 532.



- \*Heirs of Stevenson v. Cunningham (32 L.D. 650); overruled so far as in conflict, 41 L.D. 119. (See 43 L.D. 196.)
- Heirs of Talkington v. Hempfling (2 L.D. 46); overruled, 14 L.D. 200.
- Heirs of Vradenberg *et al.* v. Orr *et al.* (25 L.D. 232); overruled, 38 L.D. 253.
- Helmer, Inkerman (34 L.D. 341); modified, 42 L.D. 472.
- Helphrey v. Coil (49 L.D. 624); overruled, Dennis v. Jean (A-20899), July 24, 1937, unreported.
- Henderson, John W. (40 L.D. 518); vacated, 43 L.D. 106. (See 44 L.D. 112 and 49 L.D. 484.)
- Hennig, Nellie J. (38 L.D. 443, 445); recalled and vacated, 39 L.D. 211.
- Hensel, Ohmer V. (45 L.D. 557); distinguished, 66 I.D. 275.
- Herman v. Chase *et al.* (37 L.D. 590); overruled, 43 L.D. 246.
- Herrick, Wallace H. (24 L.D. 23); overruled, 25 L.D. 113.
- Hess, Hoy, Assignee (46 L.D. 421); overruled, 51 L.D. 287.
- Hickey, M. A. *et al.* (3 L.D. 83); modified, 5 L.D. 256.
- Hildreth, Henry (45 L.D. 464); vacated, 46 L.D. 17.
- Hindman, Ada I. (42 L.D. 327); vacated in part, 43 L.D. 191.
- Hoglund, Svan (42 L.D. 405); vacated, 43 L.D. 538.
- Holden, Thomas A. (16 L.D. 493); overruled, 29 L.D. 166.
- Holland, G. W. (6 L.D. 20); overruled, 6 L.D. 639; 12 L.D. 436.
- Holland, William C. (M-27696); decided April 26, 1934; overruled in part, 55 I.D. 221.
- Hollensteiner, Walter (38 L.D. 319); overruled, 47 L.D. 260.
- Holman v. Central Montana Mines Co. (34 L.D. 568); overruled so far as in conflict, 47 L.D. 590.
- Hon. v. Martinas (41 L.D. 119); modified, 43 L.D. 197.
- Hooper, Henry (6 L.D. 624); modified, 19 L.D. 86, 284.
- Howard v. Northern Pacific R.R. Co. (23 L.D. 6); overruled, 28 L.D. 126.
- Howard, Thomas (3 L.D. 409). (See 39 L.D. 162, 225.)
- Howell, John H. (24 L.D. 35); overruled, 28 L.D. 204.
- Howell, L. C. (39 L.D. 92). (See 39 L.D. 411.)
- Hoy, Assignee of Hess (46 L.D. 421); overruled, 51 L.D. 287.
- Hughes v. Greathead (43 L.D. 497); overruled, 49 L.D. 413. (See 260 U.S. 427.)
- Hull *et al.* v. Ingle (24 L.D. 214); overruled, 30 L.D. 258.
- Huls, Clara (9 L.D. 401); modified, 21 L.D. 377.
- Humble Oil & Refining Co. (64 I.D. 5); distinguished, 65 I.D. 316.
- Hunter, Charles H. (60 I.D. 395); distinguished, 63 I.D. 65.
- Hurley, Bertha C. (TA-66 (Ir.)), March 21, 1952, unreported; overruled, 62 I.D. 12.
- Hyde, F. A. (27 L.D. 472); vacated, 28 L.D. 284.
- Hyde, F. A. *et al.* (40 L.D. 284); overruled, 43 L.D. 381.
- Hyde *et al.* v. Warren *et al.* (14 L.D. 576; 15 L.D. 415). (See 19 L.D. 64.)
- Ingram, John D. (37 L.D. 475). (See 43 L.D. 544.)
- Inman v. Northern Pacific R.R. Co. (24 L.D. 318); overruled, 28 L.D. 95.
- Instructions (32 L.D. 604); overruled so far as in conflict, 50 L.D. 628; 53 I.D. 365; Lillian M. Peterson, *et al.* (A-20411), August 5, 1937, unreported. (See 59 I.D. 282, 286.)
- Instructions (51 L.D. 51); overruled so far as in conflict, 54 I.D. 36.
- Interstate Oil Corp. and Frank O. Chittenden (50 L.D. 262); overruled so far as in conflict, 53 I.D. 228.
- Iowa Railroad Land Co. (23 L.D. 79; 24 L.D. 125); vacated, 29 L.D. 79.

- Jacks *v.* Belard *et al.* (29 L.D. 369); vacated, 30 L.D. 345.
- Jackson Oil Co. *v.* Southern Pacific Ry. Co. (40 L.D. 528); overruled, 42 L.D. 317.
- Johnson *v.* South Dakota (17 L.D. 411); overruled so far as in conflict, 41 L.D. 22.
- Jones, James A. (3 L.D. 176); overruled, 8 L.D. 448.
- Jones *v.* Kennett (6 L.D. 688); overruled, 14 L.D. 429.
- Kackmann, Peter (1 L.D. 86); overruled, 16 L.D. 464.
- Kanawha Oil and Gas Co., Assignee (50 L.D. 639); overruled so far as in conflict, 54 L.D. 371.
- Kemp, Frank A. (47 L.D. 560); overruled so far as in conflict, 60 L.D. 417, 419.
- Kemper *v.* St. Paul and Pacific R.R. Co. (2 C.L.L. 805); overruled, 18 L.D. 101.
- Kilner, Harold E. *et al.* (A-21845); February 1, 1939, unreported; overruled so far as in conflict, 59 L.D. 258, 260.
- King *v.* Eastern Oregon Land Co. (23 L.D. 579); modified, 30 L.D. 19.
- Kinney, E. C. (44 L.D. 580); overruled so far as in conflict, 53 L.D. 228.
- Kinsinger *v.* Peck (11 L.D. 202). (See 39 L.D. 162, 225.)
- Kiser *v.* Keech (7 L.D. 25); overruled, 23 L.D. 119.
- Knight, Albert B., *et al.* (30 L.D. 227); overruled, 31 L.D. 64.
- Knight *v.* Heirs of Knight (39 L.D. 362, 491; 40 L.D. 461); overruled, 43 L.D. 242.
- Kniskern *v.* Hastings and Dakota R.R. Co. (6 C.L.O. 50); overruled, 1 L.D. 362.
- Kolberg, Peter F. (37 L.D. 453); overruled, 43 L.D. 181.
- Krigbaum, James T. (12 L.D. 617); overruled, 26 L.D. 448.
- Krushnic, Emil L. (52 L.D. 282, 295); vacated, 53 L.D. 42, 45. (See 280 U.S. 306.)
- Lackawanna Placer Claim (36 L.D. 36); overruled, 37 L.D. 715.
- La Follette, Harvey M. (26 L.D. 453); overruled so far as in conflict, 59 L.D. 416, 422.
- Lamb *v.* Ullery (10 L.D. 528); overruled, 32 L.D. 331.
- Largent, Edward B., *et al.* (13 L.D. 397); overruled so far as in conflict, 42 L.D. 321.
- Larson, Syvert (40 L.D. 69); overruled, 43 L.D. 242.
- Lasselle *v.* Missouri, Kansas and Texas Ry. Co. (3 C.L.O. 10); overruled, 14 L.D. 278.
- Las Vegas Grant (13 L.D. 646; 15 L.D. 58); revoked, 27 L.D. 683.
- Laughlin, Allen (31 L.D. 256); overruled, 41 L.D. 361.
- Laughlin *v.* Martin (18 L.D. 112); modified, 21 L.D. 40.
- Law *v.* State of Utah (29 L.D. 623); overruled, 47 L.D. 359.
- Lemmons, Lawson H. (19 L.D. 37); overruled, 26 L.D. 398.
- Leonard, Sarah (1 L.D. 41); overruled, 16 L.D. 464.
- Lindberg, Anna C. (3 L.D. 95); modified, 4 L.D. 299.
- Linderman *v.* Wait (6 L.D. 689); overruled, 13 L.D. 459.
- \*Linhart *v.* Santa Fe Pacific R.R. Co. (36 L.D. 41); overruled, 41 L.D. 284. (See 43 L.D. 536.)
- Little Pet Lode (4 L.D. 17); overruled, 25 L.D. 550.
- Lock Lode (6 L.D. 105); overruled so far as in conflict, 26 L.D. 123.
- Lockwood, Francis A. (20 L.D. 361); modified, 21 L.D. 200.
- Lonergran *v.* Shockley (33 L.D. 238); overruled so far as in conflict, 34 L.D. 314; 36 L.D. 199.
- Louisiana, State of (8 L.D. 126); modified, 9 L.D. 157.
- Louisiana, State of (24 L.D. 231); vacated, 26 L.D. 5.
- Louisiana, State of (47 L.D. 366); overruled so far as in conflict, 51 L.D. 291.
- Louisiana, State of (48 L.D. 201); overruled so far as in conflict, 51 L.D. 291.

- Lucy B. Hussey Lode (5 L.D. 93); overruled, 25 L.D. 495.
- Luse, Jeanette L. *et al.* (61 I.D. 103); distinguished by Richfield Oil Corp. 71 I.D. 243.
- Luton, James W. (34 L.D. 468); overruled so far as in conflict, 35 L.D. 102.
- Lyman, Mary O. (24 L.D. 493); overruled so far as in conflict, 43 L.D. 221.
- Lynch, Patrick (7 L.D. 33); overruled so far as in conflict, 13 L.D. 713.
- Madigan, Thomas (8 L.D. 188); overruled, 27 L.D. 448.
- Maginnis, Charles P. (31 L.D. 222); overruled, 35 L.D. 399.
- Maginnis, John S. (32 L.D. 14); modified, 42 L.D. 472.
- Maher, John M. (34 L.D. 342); modified, 42 L.D. 472.
- Mahoney, Timothy (41 L.D. 129); overruled, 42 L.D. 313.
- Makela, Charles (46 L.D. 509); extended, 49 L.D. 244.
- Makemson v. Snider's Heirs (22 L.D. 511); overruled, 32 L.D. 650.
- Malone Land and Water Co. (41 L.D. 138); overruled in part, 43 L.D. 110.
- Maney, John J. (35 L.D. 250); modified, 48 L.D. 153.
- Maple, Frank (37 L.D. 107); overruled, 43 L.D. 181.
- Martin v. Patrick (41 L.D. 284); overruled, 43 L.D. 536.
- Mason v. Cromwell (24 L.D. 248); vacated, 26 L.D. 369.
- Masten, E. C. (22 L.D. 337); overruled, 25 L.D. 111.
- Mather *et al.* v. Hackley's Heirs (15 L.D. 487); vacated, 19 L.D. 48.
- Maughan, George W. (1 L.D. 25); overruled, 7 L.D. 94.
- Maxwell and Sangre de Cristo Land Grants (46 L.D. 301); modified, 48 L.D. 88.
- McBride v. Secretary of the Interior (8 C.L.O. 10); modified, 52 L.D. 33.
- McCalla v. Acker (29 L.D. 203); vacated, 30 L.D. 277.
- McCord, W. E. (23 L.D. 137); overruled to extent of any possible inconsistency, 56 I.D. 73.
- McCornick, William S. (41 L.D. 661, 666); vacated, 43 L.D. 429.
- \*McCraney v. Heirs of Hayes (33 L.D. 21); overruled so far as in conflict, 41 L.D. 119. (See 43 L.D. 196.)
- McDonald, Roy (34 L.D. 21); overruled, 37 L.D. 285.
- \*McDonogh School Fund (11 L.D. 378); overruled, 30 L.D. 616. (See 35 L.D. 399.)
- McFadden *et al.* v. Mountain View Mining and Milling Co. (26 L.D. 530); vacated, 27 L.D. 358.
- McGee, Edward D. (17 L.D. 285); overruled, 29 L.D. 166.
- McGrann, Owen (5 L.D. 10); overruled, 24 L.D. 502.
- McGregor, Carl (37 L.D. 693); overruled, 38 L.D. 148.
- McHarry v. Stewart (9 L.D. 344); criticized and distinguished, 56 I.D. 340.
- McKernan v. Bailey (16 L.D. 368); overruled, 17 L.D. 494.
- \*McKittrick Oil Co. v. Southern Pacific R.R. Co. (37 L.D. 243); overruled so far as in conflict, 40 L.D. 528. (See 42 L.D. 317.)
- McMicken, Herbert *et al.* (10 L.D. 97; 11 L.D. 96); distinguished, 58 I.D. 257, 260.
- McNamara *et al.* v. State of California (17 L.D. 296); overruled, 22 L.D. 666.
- McPeck v. Sullivan *et al.* (25 L.D. 281); overruled, 36 L.D. 26.
- \*Mee v. Hughart *et al.* (23 L.D. 455); vacated, 28 L.D. 209. In effect reinstated, 44 L.D. 414, 487, 46 L.D. 434; 48 L.D. 195, 346, 348; 49 L.D. 660.
- \*Meeboer v. Heirs of Schut (35 L.D. 335); overruled so far as in conflict, 41 L.D. 119. (See 43 L.D. 196.)
- Mercer v. Buford Townsite (35 L.D. 119); overruled, 35 L.D. 649.
- Meyer, Peter (6 L.D. 639); modified, 12 L.D. 436.
- Meyer v. Brown (15 L.D. 307). (See 39 L.D. 162, 225.)
- Midland Oilfields Co. (50 L.D. 620); overruled so far as in conflict, 54 I.D. 371.

- Mikesell, Henry D., A-24112 (Mar. 11, 1946); *rehearing denied* (June 20, 1946), overruled to extent inconsistent, 70 L.D. 149.
- Miller, D. (60 I.D. 161); overruled in part, 62 I.D. 210.
- Miller, Edwin J. (35 L.D. 411); overruled, 43 L.D. 181.
- Miller v. Sebastian (19 L.D. 288); overruled, 26 L.D. 448.
- Milner and North Side R.R. Co. (36 L.D. 488); overruled, 40 L.D. 187.
- Milton *et al.* v. Lamb (22 L.D. 339); overruled, 25 L.D. 550.
- Milwaukee, Lake Shore and Western Ry. Co. (12 L.D. 79); overruled, 29 L.D. 112.
- Miner v. Mariott *et al.* (2 L.D. 709); modified, 28 L.D. 224.
- Minnesota and Ontario Bridge Company (30 L.D. 77); no longer followed, 50 L.D. 359.
- \*Mitchell v. Brown (3 L.D. 65); overruled, 41 L.D. 396. (See 43 L.D. 520.)
- Monitor Lode (18 L.D. 358); overruled, 25 L.D. 495.
- Monster Lode (35 L.D. 493); overruled so far as in conflict, 55 I.D. 348.
- Moore, Charles H. (16 L.D. 204); overruled, 27 L.D. 482.
- Morgan, Henry S. *et al.* (65 I.D. 369); overruled to extent inconsistent, 71 I.D. 22.
- Morgan v. Craig (10 C.L.O. 234); overruled, 5 L.D. 303.
- Morgan v. Rowland (37 L.D. 90); overruled, 37 L.D. 618.
- Moritz v. Hinz (36 L.D. 450); vacated, 37 L.D. 382.
- Morrison, Charles S. (36 L.D. 126); modified, 36 L.D. 319.
- Morrow *et al.* v. State of Oregon *et al.* (32 L.D. 54); modified, 33 L.D. 101.
- Moses, Zelmer R. (36 L.D. 473); overruled, 44 L.D. 570.
- Mountain Chief Nos. 8 and 9 Lode Claims (36 L.D. 100); overruled in part, 36 L.D. 551.
- Mt. Whitney Military Reservation (40 L.D. 315). (See 43 L.D. 33.)
- Muller, Ernest (46 L.D. 243); overruled, 48 L.D. 163.
- Muller, Esberne K. (39 L.D. 72); modified, 39 L.D. 360.
- Mulnix, Philip, Heirs of (33 L.D. 331); overruled, 43 L.D. 532.
- Myll, Clifton O., 71 I.D. 458 (1964); as supplemented, 71 I.D. 486 (1964), vacated (72 I.D. 536) (1965).
- Nebraska, State of (18 L.D. 124); overruled, 28 L.D. 358.
- Nebraska, State of v. Dorrington (2 C.L.L. 647); overruled, 26 L.D. 123.
- Neilsen v. Central Pacific R.R. Co. *et al.* (26 L.D. 252); modified, 30 L.D. 216.
- Newbanks v. Thompson (22 L.D. 490); overruled, 29 L.D. 108.
- Newlon, Robert C. (41 L.D. 421); overruled so far as in conflict, 43 L.D. 364.
- New Mexico, State of (46 L.D. 217); overruled, 48 L.D. 98.
- New Mexico, State of (49 L.D. 314); overruled, 54 I.D. 159.
- Newton, Walter (22 L.D. 322); modified, 25 L.D. 188.
- New York Lode and Mill Site (5 L.D. 513); overruled, 27 L.D. 373.
- \*Nickel, John R. (9 L.D. 388); overruled, 41 L.D. 129. (See 42 L.D. 313.)
- Northern Pacific R.R. Co. (20 L.D. 191); modified, 22 L.D. 224; overruled so far as in conflict, 29 L.D. 550.
- Northern Pacific R.R. Co. (21 L.D. 412; 23 L.D. 204; 25 L.D. 501); overruled, 53 I.D. 242. (See 26 L.D. 265; 33 L.D. 426; 44 L.D. 218; 177 U.S. 435.)
- Northern Pacific Ry. Co. (48 L.D. 573); overruled so far as in conflict, 51 L.D. 196. (See 52 L.D. 58.)
- Northern Pacific R.R. Co. v. Bowman (7 L.D. 238); modified, 18 L.D. 224.
- Northern Pacific R.R. Co. v. Burns (6 L.D. 21); overruled, 20 L.D. 191.
- Northern Pacific R.R. Co. v. Loomis (21 L.D. 395); overruled, 27 L.D. 464.
- Northern Pacific R.R. Co. v. Marshall *et al.* (17 L.D. 545); overruled, 28 L.D. 174.

- Northern Pacific R.R. Co. *v.* Miller (7 L.D. 100); overruled so far as in conflict, 16 L.D. 229.
- Northern Pacific R.R. Co. *v.* Sherwood (28 L.D. 126); overruled so far as in conflict, 29 L.D. 550.
- Northern Pacific R.R. Co. *v.* Symons (22 L.D. 686); overruled, 28 L.D. 95.
- Northern Pacific R.R. Co. *v.* Urquhart (8 L.D. 365); overruled, 28 L.D. 126.
- Northern Pacific R.R. Co. *v.* Walters *et al.* (13 L.D. 230); overruled so far as in conflict, 49 L.D. 391.
- Northern Pacific R.R. Co. *v.* Yantis (8 L.D. 58); overruled, 12 L.D. 127.
- Nunez, Roman C. and Serapio (56 I.D. 363); overruled so far as in conflict, 57 I.D. 213.
- Nyman *v.* St. Paul, Minneapolis, and Manitoba Ry. Co. (5 L.D. 396); overruled, 6 L.D. 750.
- O'Donnell, Thomas J. (28 L.D. 214); overruled, 35 L.D. 411.
- Olson *v.* Traver *et al.* (26 L.D. 350, 628); overruled so far as in conflict, 29 L.D. 480; 30 L.D. 382.
- Opinion A.A.G. (35 L.D. 277); vacated, 36 L.D. 342.
- Opinion of Acting Solicitor, June 6, 1941; overruled so far as inconsistent, 60 I.D. 333.
- Opinion of Acting Solicitor, July 30, 1942; overruled so far as in conflict, 58 I.D. 331. (See 59 I.D. 346, 350.)
- Opinion of Chief Counsel, July 1, 1914 (43 L.D. 339); explained, 68 I.D. 372.
- Opinion of Solicitor, October 31, 1917 (D-40462); overruled so far as inconsistent, 58 I.D. 85, 92, 96.
- Opinion of Solicitor, February 7, 1919 (D-44083); overruled, November 4, 1921 (M-6397). (See 58 I.D. 158, 160.)
- Opinion of Solicitor, August 8, 1933 (M-27499); overruled so far as in conflict, 54 I.D. 402.
- Opinion of Solicitor, June 15, 1934 (54 I.D. 517); overruled in part, February 11, 1957 (M-36410).
- Opinion of Solicitor, May 8, 1940 (57 I.D. 124); overruled in part, 58 I.D. 562, 567.
- Opinion of Solicitor, August 31, 1943 (M-33183); distinguished, 58 I.D. 726, 729.
- Opinion of Solicitor, May 2, 1944 (58 I.D. 680); distinguished, 64 I.D. 141.
- Opinion of Solicitor, Oct. 22, 1947 (M-34999); distinguished, 68 I.D. 433.
- Opinion of Solicitor, March 28, 1949 (M-35093); overruled in part, 64 I.D. 70.
- Opinion of Solicitor, 60 I.D. 436 (1950); will not be followed to the extent that it conflicts with these views, 72 I.D. 92 (1965).
- Opinion of Solicitor, Jan. 19, 1956 (M-36378); overruled to extent inconsistent, 64 I.D. 58.
- Opinion of Solicitor, June 4, 1957 (M-36443); overruled in part, 65 I.D. 316.
- Opinion of Solicitor, July 9, 1957 (M-36442); withdrawn and superseded, 65 I.D. 386, 388.
- Opinion of Solicitor, Oct. 30, 1957, 64 I.D. 393 (M-36429); no longer followed, 67 I.D. 366.
- Opinion of Solicitor, Oct. 27, 1958 (M-36531); overruled, 69 I.D. 110.
- Opinion of Solicitor, July 20, 1959 (M-36531, Supp.); overruled, 69 I.D. 110.
- Opinion of Solicitor, 68 I.D. 433 (1961); distinguished and limited, 72 I.D. 245 (1965).
- Opinions of Solicitor, September 15, 1914, and February 2, 1915; overruled, September 9, 1919 (D-43035, May Caramony). (See 58 I.D. 149, 154-156.)
- Oregon and California R.R. Co. *v.* Puckett (39 L.D. 169); modified, 53 I.D. 264.
- Oregon Central Military Wagon Road Co. *v.* Hart (17 L.D. 480); overruled, 18 L.D. 543.
- Owens *et al.* *v.* State of California (22 L.D. 369); overruled, 38 L.D. 253.
- Pace *v.* Carstarphen *et al.* (50 L.D. 369); distinguished, 61 I.D. 459.
- Pacific Slope Lode (12 L.D. 686); overruled so far as in conflict, 25 L.D. 518.

- Papina v. Alderson* (1 B.L.P. 91); modified, 5 L.D. 256.
- Patterson, Charles E.* (3 L.D. 260); modified, 6 L.D. 284, 624.
- Paul Jones Lode* (28 L.D. 120); modified, 31 L.D. 359.
- Paul v. Wiseman* (21 L.D. 12); overruled, 27 L.D. 522.
- Pecos Irrigation and Improvement Co.* (15 L.D. 470); overruled, 18 L.D. 168, 268.
- Pennock, Belle L.* (42 L.D. 315); vacated, 43 L.D. 66.
- Perry v. Central Pacific R.R. Co.* (39 L.D. 5); overruled so far as in conflict, 47 L.D. 304.
- Phebus, Clayton* (48 L.D. 128); overruled so far as in conflict, 50 L.D. 281; overruled to extent inconsistent, 70 L.D. 159.
- Phelps, W. L.* (8 C.L.O. 139); overruled, 2 L.D. 854.
- Phillips, Alonzo* (2 L.D. 321); overruled, 15 L.D. 424.
- Phillips v. Breazeale's Heirs* (19 L.D. 573); overruled, 39 L.D. 93.
- Pieper, Agnes C.* (35 L.D. 459); overruled, 43 L.D. 374.
- Pierce, Lewis W.* (18 L.D. 328); vacated, 53 I.D. 447; overruled so far as in conflict, 59 I.D. 416, 442.
- Pietkiewicz et al. v. Richmond* (29 L.D. 195); overruled, 37 L.D. 145.
- Pike's Peak Lode* (10 L.D. 200); overruled in part, 20 L.D. 204.
- Pike's Peak Lode* (14 L.D. 47); overruled, 20 L.D. 204.
- Popple, James* (12 L.D. 433); overruled, 13 L.D. 588.
- Powell, D. C.* (6 L.D. 302); modified, 15 L.D. 477.
- Prange, Christ C. and William C. Braasch* (48 L.D. 488); overruled so far as in conflict, 60 I.D. 417, 419.
- Premo, George* (9 L.D. 70). (See 39 L.D. 162, 225.)
- Prescott, Henrietta P.* (46 L.D. 486); overruled, 51 L.D. 287.
- Pringle, Wesley* (13 L.D. 519); overruled, 29 L.D. 599.
- Provensal, Victor H.* (30 L.D. 616); overruled, 35 L.D. 399.
- Prue, Widow of Emmanuel* (6 L.D. 436); vacated, 33 L.D. 409.
- Pugh, F. M. et al.* (14 L.D. 274); in effect vacated, 232 U.S. 452.
- Puyallup Allotments* (20 L.D. 157); modified, 29 L.D. 628.
- Ramsey, George L., Heirs of Edwin C. Philbrick* (A-16060), August 6, 1931, unreported; recalled and vacated, 58 I.D. 272, 275, 290.
- Rancho Alisal* (1 L.D. 173); overruled, 5 L.D. 320.
- Rankin, James D. et al.* (7 L.D. 411); overruled, 35 L.D. 32.
- Rankin, John M.* (20 L.D. 272); reversed, 21 L.D. 404.
- Rebel Lode* (12 L.D. 683); overruled, 20 L.D. 204; 48 L.D. 523.
- \*Reed v. Buffington* (7 L.D. 154); overruled, 8 L.D. 110. (See 9 L.D. 360.)
- Regione v. Rosseler* (40 L.D. 93); vacated, 40 L.D. 420.
- Reid, Bettie H., Lucille H. Pipkin* (61 I.D. 1); overruled, 61 I.D. 355.
- Rialto No. 2 Placer Mining Claim* (34 L.D. 44); overruled, 37 L.D. 250.
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NOTE.—The abbreviations used in this title refer to the following publications: "B.L.P." to Brainard's Legal Precedents in Land and Mining Cases, vols. 1 and 2; "C.L.L." to Copp's Public Land Laws edition of 1875, 1 volume; edition of 1882, 2 volumes; edition of 1890, 2 volumes; "C.L.O." to Copp's Land Owner, vols. 1-18; "L. and R." to records of the former Division of Lands and Railroads; "L.D." to the Land Decisions of the Department of the Interior, vols. 1-52; "I.D." to Decisions of the Department of the Interior, beginning with vol. 53.—  
EDITOR.

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# DECISIONS OF THE DEPARTMENT OF THE INTERIOR

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STATE OF ALASKA  
ANDREW J. KALERAK, JR.

A-30518

*Decided January 20, 1966*

**Alaska: Land Grants and Selections: Applications—Applications and Entries: Segregative Effect—State Grants—Withdrawals and Reservations: Generally**

A selection filed by the State of Alaska for lands granted to it by the Statehood Act which is accepted by the land office and posted on the public land records segregates the land from all appropriations based on settlement and location so long as it remains of record, despite the fact that the selected land was in a withdrawal at the time the State filed its selection.

**Alaska: Land Grants and Selections: Applications—Applications and Entries: Filing—Applications and Entries: Amendments—State Grants**

While in general an application or selection filed by a State for land while it is withdrawn is invalid and does not become valid upon revocation of the withdrawal, the rule against premature filings was adopted for administrative convenience and to insure equality of opportunity to file and where these considerations are not pertinent, amendments to a premature application filed by the State during a statutory preference-right period and thereafter may be accepted as reaffirmations of the original filing and treated as though the State had refiled its original application at the time of the amendments.

## APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The State of Alaska has appealed to the Secretary of the Interior from a decision dated July 20, 1965, of the Chief, Office of Appeals and Hearings, Bureau of Land Management, rejecting in part its selection application Anchorage 058566 and reversing a decision dated June 9, 1965, of the Anchorage district and land office refusing to accept for recordation a notice of location of a settlement, Anchorage

73 I.D. No. 1

058566, submitted by Andrew Kalerak, Jr., for lands in conflict with the State's selection.

In addition, Ray W. McCubbins and ten others have also appealed to the Director of the Bureau of Land Management from letter decisions of the Anchorage district land office refusing to accept their respective notices of settlement or occupancy claims.<sup>1</sup> Because in our view the legal issue governing the disposition of the case on appeal to the Secretary is the same as that in the cases on appeal to the Director, they will be considered and decided with the pending appeal.<sup>2</sup>

The lands selected by the State, a small part of which is also sought by the individual applicants, cover approximately 20,000 acres in Ts. 11 and 12 N., Rs. 1 and 2 W., Seward Meridian, Alaska, most of which had been withdrawn by paragraph (4) of Public Land Order No. 576 of March 29, 1949, 14 F.R. 1614, from all forms of appropriation for the protection of the water supply of the City of Anchorage.

The attempt to transfer the selected lands from the Federal Government to the State began, apparently, with a request of March 8, 1962, of the City of Anchorage to the Anchorage land office that these lands be withdrawn for watershed purposes for the protection of the city's water supply. In a letter dated September 28, 1962, to the State Division of Lands, the State office of the Bureau of Land Management said that the city was not a proper applicant for a withdrawal and that most of the land it desired was already withdrawn or otherwise segregated. It then offered as a suggestion for placing the lands in State or local ownership that the State file a blanket selection for the withdrawn lands with an assurance that the selected lands would be

<sup>1</sup> The names of the applicants, serial numbers, and type of claim are as follows:

	An- chor- age		Date received
Ray W. McCubbins.....	062524	Homestead.....	May 28, 1965
Lawrence McCubbins.....	062558	Homestead.....	June 7, 1965
Carl B. Fiscus*.....	062609	Homestead.....	June 7, 1965
Lawrence J. Wolfram.....	062614	Trade & Mfg. Site.....	June 11, 1965
Lawrence J. Wolfram.....	062622	Homestead.....	June 14, 1965
Ronald L. Thiel.....	062624	Trade & Mfg. Site.....	June 14, 1965
Ronald L. Thiel.....	062625	Homestead.....	June 14, 1965
Armand C. Sipielman.....	062627	Homestead.....	June 15, 1965
Arvil Gary Taylor.....	062629	Homestead.....	June 15, 1965
Gerald Baxter.....	062639	Homestead.....	June 16, 1965
C. H. Trombley.....	062649	Homestead.....	June 17, 1965

\*Fiscus filed a relinquishment of his claim on December 6, 1965.

<sup>2</sup> The Secretary of the Interior may in the exercise of his supervisory authority assume jurisdiction over a case pending on appeal before the Director of the Bureau of Land Management without awaiting a decision by the Director and a subsequent appeal from that decision. *Public Service Company of New Mexico*, 71 I.D. 427 (1964); *U.S. v. M. V. Browning, Administrator*, 68 I.D. 183 (1961).

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classified for watershed purposes. The Bureau would then, the letter continued, request revocation of paragraph (4) of Public Land Order No. 576 and, when that was done, the State selection would become effective immediately.

The Director of the State Division of Lands informed the land office on January 8, 1963, that the suggested plan was agreeable to the State and the city. On the same day the State filed a formal selection application, A-058566, pursuant to section 6(b) of the Alaska Statehood Act, July 7, 1958, 72 Stat. 340, 48 U.S.C. pp. 9025, 9026,<sup>3</sup> for 26,880 acres of public land.<sup>4</sup>

In accordance with the regular practice the State's selection was posted in the appropriate land and status records.

On April 8, 1963, the Department issued Public Land Order No. 3022, 28 F.R. 3661, revoking the withdrawal made by paragraph (4) of Public Land Order No. 576, *supra*. The order also provided:

3. Subject to any existing valid rights and the requirements of applicable law, the public lands are hereby opened to settlement and to filing of such applications, selections, and locations as are allowable on unsurveyed lands in accordance with the following:

a. Until 10:00 a.m. on July 8, 1963, the State of Alaska shall have a preferred right to select the lands in accordance with provisions of the Act of July 28, 1956 (70 Stat. 709; 48 U.S.C. 46-3b), and section 6(g) of the Alaska Statehood Act of July 7, 1958 (72 Stat. 339), and the regulations in 43 CFR Part 76.

b. All other valid applications and selections under the nonmineral public land laws including applications and offers under the mineral leasing laws for those lands described in Paragraph 1 hereof, presented at or prior to 10:00 a.m. July 8, 1963, will be considered as simultaneously filed at that hour. Rights under such applications and selections filed after that hour will be governed by the time of filing.

4. Persons claiming preference rights based upon valid settlement, statutory preference, or equitable claims must enclose properly corroborated statements in support of their applications, setting forth all facts relevant to their claims.

5. The lands will be subject to the operation of the public land laws generally, including location under the United States mining laws, beginning at 10:00 a.m. on July 8, 1963. The lands described in Paragraph 2 hereof, have been open to applications and offers under the mineral leasing laws.

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<sup>3</sup> Section 6(b) granted to the State and entitled it to select not more than 102,550,000 acres from the public lands which are "vacant, unappropriated, and unreserved at the time of their selection."

<sup>4</sup> In the next 14 months the State filed four amendments adding tracts of various sizes to its selection application. April 8, 1963—950 acres; May 24, 1963—640 acres; March 13, 1964—3,777 acres; March 17, 1964—certain lands restored by P.L.O. 3314, of January 17, 1964, 29 F.R. 1327.

Inquiries concerning the lands should be addressed to the Manager, Land Office, Bureau of Land Management, Anchorage, Alaska.<sup>5</sup>

On October 8, 1964, the land office issued a decision directing that the State publish a notice of its application in an Anchorage newspaper for five consecutive weeks.<sup>6</sup>

The publication was carried out within the time allowed, the notice stating:

Notice is also given that the above described lands have, since these dates [the dates on which the original application and amendments were filed], been segregated from all applications and appropriations under the public land laws, including settlement under the homestead and similar laws and locations under the mining laws. Settlements and locations initiated on or after these dates are null and void.

About 7 months after first publication, Andrew Kalerak, Jr., on May 27, 1965, filed a Notice of Location of Settlement or Occupancy Claim in Alaska, stating that he had made a settlement under the homestead laws on May 26, 1965, on unsurveyed lands which would probably be the NW $\frac{1}{4}$  sec. 19, T. 12 N., R. 2 W., S.M., Alaska. Kalerak completed Item 5 of the form, which begins: "Improvements on the lands \* \* \*," by inserting: "None, when I settled. I have staked each corner, marked the boundaries, post [sic] the land with a copy of this notice, and placed cement blocks on the land for a start of a foundation."

On June 9, 1965, by a letter-decision the land office held that Kalerak's location notice was unacceptable for recordation because the lands described in his claim were included in a valid selection by the State and therefore were segregated from all applications and appropriations under the public land laws. On appeal, the Office of Appeals and Hearings rejected the State's selection application insofar as it includes lands described in paragraph (4) of Public Land Order No.

<sup>5</sup> Section 6(g) of the act of July 7, 1958, *supra*, states in part: "The authority to make selections shall never be alienated or bargained away, in whole or in part, by the State. Upon the revocation of any order of withdrawal in Alaska, the order of revocation shall provide for a period of not less than 90 days before the date on which it otherwise becomes effective, if subsequent to the admission of Alaska into the Union, during which period the State of Alaska shall have a preferred right of selection, subject to the requirements of this Act \* \* \*."

<sup>6</sup> The decision stated:

"\* \* \* The selected lands are of a class subject to selection under the Act [sec. 6(b) of the act of July 7, 1958, *supra*] \* \* \*."

"The selected lands are now segregated from all appropriations under the public land laws. This segregation will automatically terminate unless the State publishes first notice of its application within 60 days of receipt of this decision (43 CFR 76.16) [now 43 CFR 2013.9-4]."

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576, *supra*, and reversed the land office decision insofar as it refused to accept the notice of location for recording.

The decision held that on the date that the State filed its original selection application the land described in paragraph (4) of Public Land Order No. 576, *supra*, was still withdrawn, that section 6(b) of the act of July 7, 1958, permits selections only from vacant, unappropriated and unreserved land, that on the filing date these lands were not eligible for selection, and that an application filed while land is withdrawn is invalid. The restoration of the lands by Public Land Order No. 3022, *supra*, it continued, was not effective retroactively, and when the State did not file a new application, or amend its original application to select the lands after they had been restored either during the preference period or thereafter, the lands became available for other application and settlement at the end of the preference period, which was 10:00 a.m. on July 8, 1963. Therefore, it concluded, the land embraced in Kalerak's claim was open to homestead settlement.

The State in its appeal to the Secretary contends that (1) the State relied on the Bureau of Land Management's interpretation of the applicable statute and regulations and that these interpretations can be relied upon and will be accorded great weight by the courts, (2) the State's selection, even if ineffective when filed, is to be considered as filed as of the time the land was opened to entry, and (3) the State can exercise the preference right given it by section 6(g) of the Statehood Act, *supra*, for land unavailable when the State files, to take effect when the land becomes available.

Kalerak, in opposition, maintains that the interpretation of the statute and regulations by the local Bureau office permitting blanket selections of lands whether available or not is erroneous and that no selections could be made of lands withdrawn by Public Land Order No. 576 while it was in effect, that the State has not established an administrative interpretation of the statute which is controlling, and that an agreement between the local Bureau office and the State cannot bind or estop the Secretary from making his own independent examination of the merits of the local office practice, that Public Land Order No. 3022 did not allow the State to file prior to the revocation of Public Land Order No. 576 and, finally, that the State, by making the selection on behalf of the city, has violated the prohibition in 6(g) of the Statehood Act, *supra*, which provides that:

The authority to make selections shall never be alienated or bargained away, in whole or in part, by the State.

Although the issue on appeal to the Secretary has become the validity of the State's selection insofar as it covers lands formerly in Public Land Order No. 576, the issue on appeal to the Director in the *Kalerak* case was, and in the 11 other cases being considered here is, whether the notices submitted by the settlers and other appellants should have been accepted for recordation by the land office. The land office refused to accept the notices on the ground that the land described in each of them was segregated by the State selection from all applications and appropriations under the public land laws, including the mining laws. The pertinent regulation provides for the return of the filing fee required to accompany a notice of settlement claim "where the notice is not acceptable to the land office for recording because the land is not subject to homestead settlement." 43 CFR 211.9-1(d).<sup>7</sup>

As far as *Kalerak* and the other individual applicants are concerned, the issue is whether the land was subject to homestead settlement or to occupancy as a trade or manufacturing site. They contend that the State's selection is defective because it was filed prematurely, and that, as a result, the State selection erected no obstacle to their attempts to establish their claims. In other words, they base their position upon the premise that a defective State selection cannot close the land selected to later appropriation.

Before examining the validity of the State's selection, we will first consider the soundness of the individual applicants' premise.

At the time the State first filed its selection the pertinent regulation described the effect of the State's action as follows:

Lands desired by the State under the regulations of this part will be segregated from all appropriations based upon application or settlement and location, including locations under the mining laws, when the State files its application for selection in the appropriate land office properly describing the lands as provided in § 76.9(a), (3), (4), and (5). Such segregation will automatically terminate unless the State publishes first notice as provided by § 76.17 within 60 days of service of such notice by the appropriate officer of the Bureau of Land Management.<sup>8</sup>

The regulation requires only that the State describe the lands properly to bring into play the segregative effect of its filing; it does not demand that the lands applied be available for filing, that they be eligible for selection, or that the selection be finally carried to patent.

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<sup>7</sup> Essentially the same provision is found in the homesite and headquarters site regulation, 43 CFR 2233.9-2(e), and in the trade and manufacturing site regulation, 43 CFR 2213.1-1(d).

<sup>8</sup> 43 CFR, 1964 rev., 76.16; now with minor changes 43 CFR 2222.9-5(b).

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The regulation is merely a formal restatement of a rule that the Department has long followed. Keeping in mind that the land office treated the State selection as regular, accepted it, recorded it, and posted it, we find that the Department has held:

\* \* \* the Department has invariably adhered to the rule of long standing that a selection, regular on its face when filed, \* \* \* has the same segregative effect as a homestead or other entry under the general land laws, as against all subsequent claims presented, other than those asserted by the Government, thus withdrawing the land in the meantime from appropriation by later applications \* \* \* *State of New Mexico* (On Petition) 46 L.D. 217, 222 (1917), overruled on other grounds by Administrative Order, 48 L.D. 97, 98 (1921); Circular No. 768, 48 L.D. 172 (1921).

In a later decision in a case involving a school land indemnity selection, in which after filing it developed that the State had tendered defective base land, the Department reviewed its prior rulings and concluded:

The effect of filing and allowance of a school land indemnity selection is to segregate the land selected, even though it may thereafter be found that there are defects which render cancellation necessary, and such a selection, even though erroneously received, segregates the land so that no other application therefor may be received or rights initiated by its tender. *State of Arizona*, 55 L.D. 249 (1935), syllabus.<sup>9</sup>

The Department made a particularly relevant application of the rule in *Youngblood v. State of New Mexico* (On Rehearing), 46 L.D. 109 (1917). There the State had filed a school land indemnity selection for land on August 5, 1914. Youngblood alleged that he made settlement on the land on February 6, 1916, and on February 12, 1916, he filed a homestead application. Thereafter when it was discovered that a portion of the land assigned as base had already been used in another selection, the Commissioner of the General Land Office (now Bureau of Land Management) canceled the selection in part. The State then filed an application to amend in order to cure the defect.

The Department rejected Youngblood's homestead application and on rehearing stated:

In the former Departmental decision it was held that inasmuch as the selection was intact and *prima facie* valid at the time Youngblood filed his application, the land was not subject to such application, and, therefore, he gained no rights

<sup>9</sup> Accord: *Hodges v. Colcord*, 193 U.S. 192 (1904); *McMichael v. Murphy*, 197 U.S. 304 (1905); *Joyce A. Cabot et al.*, 63 L.D. 122 (1956); *R. B. Whitaker et al.*, 63 L.D. 124 (1956).



by filing the same. Furthermore, it was held that his alleged settlement on the land under date of February 6, 1916, was likewise invalid because of the pending State selection, which segregated the land from settlement and entry.

The decision complained of is in harmony with the recent Departmental decision of March 17, 1917, in the case of *California and Oregon Land Company v. Hulén and Hunnicutt* (46 L.D. 55), wherein it was held:

"Land segregated from the public domain, whether by patent, reservation, entry, selection, or otherwise, is not subject to settlement or any other form of appropriation until its restoration to the public domain is noted upon the records of the local land office."

While the cited decisions do not involve the segregative effect of an application or entry improperly allowed because the lands applied for were unavailable, the rule is equally pertinent in that situation. In *Keating et al. v. Doll*, 48 L.D. 199 (1921), the Department held that a homestead entry allowed while the land was still withdrawn as part of a national forest segregated the land and required the rejection of applications filed later although the application for entry was prematurely filed prior to the date set for opening the land to entry and was otherwise defective.

These decisions make it abundantly clear that the lands covered by the State selection, whether or not it was defective, were not open to the initiation of claims by settlement or location and that all attempts to do so were invalid.

As the discussion below examines in greater detail, this rule is founded on the principle that all persons should have an equal opportunity to file for public land. If applications or settlements for lands noted on the public records as covered by a State selection which purports to segregate them were permitted, those who knew that the State selection was defective would have a marked advantage over those who relied upon the records to inform them whether or not the lands were available.

The just and equitable practice is the one followed by the Department. That is, while the State can gain no advantage by a premature or defective selection, a selection once filed and posted segregates the land until it is rejected and the public land records so noted. Any other course would undermine the Department's salutary policy of giving all applicants an equal chance to acquire public land.

Accordingly the land office, as required by the pertinent regulation, *supra*, properly rejected the notices of settlement or occupancy.

With the claims of the individual applicants removed from the appeal, we may now consider the status of the State's selection.

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As we have seen, the Director relied upon the general rule that an application made for land while it is withdrawn is invalid and does not become valid upon the revocation of the withdrawal. *Atherton Sinclair Burlington et al.*, 71 I.D. 126, 128, 129 (1964); *Hunt v. State of Utah*, 59 I.D. 44 (1945). While this principle is sound and controlling in most similar situations, it is necessary to examine both the reasons underlying it and Departmental practice to determine whether it requires the rejection of the State's selection here.

There are, it appears, two fundamental objections to allowing applications to be filed for lands before they are open to disposition. One is administrative. As the Department said in refusing to hold in suspense an oil and gas application for lands then unavailable for leasing:

\* \* \* the rule is founded upon sound administrative practice. It prevents the public land records from being burdened with thousands of applications on which there is no possibility that action can be taken in the foreseeable future. If one person can maintain an application for land not available for leasing several or even a hundred can. [Footnote omitted.]

In view of the hundreds of thousands of acres of public land which are not available for leasing for one reason or another, it is plain that the problem of administering premature offers would be considerable. \* \* \* *J. G. Hatheway et al.*, 68 I.D. 48, 52 (1961).

The second reason is equitable—that is, it avoids giving an applicant a preference right to which he has no right and assures to all the public equality of opportunity to file.

As the Department held in a case involving the rejection of an oil and gas lease offer for lands which the records showed to be in an existing lease which had in fact terminated and the land then had been leased again and the second lease terminated, all without notation:

\* \* \* [T]he overriding objective of the rule has been to assure to all the public equality of opportunity to file. This has been stated on many occasions. *Germania Iron Co. v. James*, 89 Fed. 811 (8th Cir. 1898), appeal dismissed, 195 U.S. 638; *George B. Friden*, A-26402 (October 8, 1952); *B. E. Van Arsdale*, 62 I.D. 475 (1955); *E. A. Vaughey* [63 I.D. 85] (1956); *M. A. Machris, Melvin A. Brown*, 63 I.D. 161 (1956).

This being the primary objective of the notation rule, to notify the public so that all will have an equal opportunity to file for land, it would be manifestly unfair to say that although there was an outstanding entry of record in the tract book of an oil and gas lease (Evanston 09156 (b)) covering the lands in secs. 2 and 11, no notation of termination of the lease was necessary to open the land to filing because, entirely outside the record, another lease (Wyoming 0257)

had been issued and terminated following the termination of the first lease. This would give an unfair advantage to those who by chance knew of the issuance of the second lease. Those who relied on the tract book would have no notice of the second lease but would await the notation of termination of Evanston 09156 (b) in the tract book before filing for the land. It would be no answer to say that others could have ascertained the issuance of Wyoming 0257 by checking the serial register and plats. The fact is that the Department has said that the tract book is the record which will be determinative of whether land is open for filing, and there is no reason why the public should have to resort to other records. *Max L. Krueger, Vaughan B. Connelly*, 65 I.D. 185, 191 (1958).

In an earlier case in which the Department considered the effect of State exchange applications filed for lands still in a temporary withdrawal, the State, while admitting that the selections were invalid and properly subject to rejection, asked that the selections be allowed to remain of record and that action be suspended until the withdrawal was revoked. In refusing to do so the Department held:

The obvious purpose in asking for the suspension of these selections is to place the State in a situation where it will have a preferred right to exchanges over others under the provisions of section 8 of the Taylor Grazing Act, the assumption being made that, upon revocation of the withdrawal that now constitutes the bar to the selections, the rights of the State would attach *eo instanti* and shut out all subsequent applicants for the same land which might lawfully be filed under the same section of the act. In other words, these invalid selections would operate as segregation of the land applied for from other appropriation attempted when the land became subject to such filing. To so hold would be in direct conflict with the ruling in *Hendricks v. Damon* (44 L.D. 205), which has been cited and applied in cases without number in the administration of the public land law. There is nothing in section 8 of the Taylor Grazing Act which accords preference to the States in exchanges made thereunder, and no circumstances appear in connection with these selections that might be deemed equities that could be made the basis of preference if and when the land becomes subject to exchanges. Action suspending these selections, for the purpose of effecting segregations in favor of the State the moment the land is released from the withdrawal of July 9, 1934, is tantamount to provisions in the order of restoration that exchanges under section 8 filed by the State shall be preferred over others that may lawfully be filed, a provision for which there is no statutory warrant. The applications here involved are void and do not become validated by the removal of the withdrawal. *State of Arizona*, A-18816, etc. (October 16, 1935).<sup>10</sup>

The question then is whether the considerations underlying the general rule are pertinent here and, if they are not, whether *cessante ratione legis, cessat et ipsa lex*, a different result should follow.

Examining the problem first again in its administrative aspects to ascertain whether the State's method imposes an undue burden on

<sup>10</sup> Accord: *Hunt v. State of Utah*, *supra*, 46-47.

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the land office, we note that the State is the only applicant whom the land office permits to file "prematurely." There is, thus, no likelihood that hundreds of other applicants will clutter the records with their filings.

Considering next the equitable aspects, we observe immediately that the State has a preference right to all land restored from withdrawal, granted to it by section 6(g) of the act of July 7, 1958, *supra*. Therefore the fact that the State did get an opportunity to file on the restored land before anyone else is not inequitable or unfair or contrary to the statutory scheme. It merely advanced a bit the time in which the State could make its statutory preference known. Since the State has a statutory preference right, it is not inequitable to give it a chance to take advantage of it.

The force of the other argument—equality of opportunity to all to file—is dissipated by the same reasoning. If the statute intends that there be no equality of filing, then no individual is harmed if the State is allowed to file somewhat sooner than that general practice permits.

Therefore we conclude that in the circumstances there are no reasons of policy which require that the Department reject the State selection.

Furthermore, as we noted earlier, the State amended its application four times, twice within the preference right period and twice thereafter and all before publication and before Kalerak or any of the other appellants sought to establish any rights to the lands in their applications or settlements.

In such circumstances is the Department bound to insist on a new filing to replace the original premature one or can it accept the amendments as a demonstration of the State's interest in its selection and relieve it of the necessity filing anew? We believe that it can.

In *Hunt v. State of Utah*, *supra*, the Department in a somewhat similar situation adopted a solution relieving the State from the necessity of strict compliance with the regular procedure. After holding that the State gained no priority by a premature filing of an application to select certain land, it having no preference right to the land sought, even after restoration of the land, the Department gave effect to the State's selection thus:

It is possible, however, to treat the Commissioner's action in reinstating the [State's] application as a ruling that in the circumstances the filing of a new application would be an unnecessary formality, and that upon reinstatement the original application should be regarded as having effect only as of the time

of such reinstatement and therefore being subject to such rights as Hunt might be deemed to have acquired by his prior [valid] application. (59 I.D. at 47.)

In other words, although the State's original and only application should have gained it nothing, the Department allowed it to be treated as though it had been filed as of the day the Commissioner purported to reinstate it.

So here the filing of an amendment to an application, in the absence of any reason not to so consider it, can be deemed the refiling of the original selection and the State's rights can be determined as though the original selection had been filed then. Since the first two amendments came within the preference period, the State, then, has exercised its preference right and has established its claim to the selected lands.

In another case where a railroad had filed an indemnity selection list for lands held by the Department not to be open to such filing, but which were thereafter made available for selection by statute, the Department held that in the absence of intervening rights the original selection list could be treated as valid from the date the Commissioner of the General Land Office instructed the local officers to allow the selection, if otherwise proper, and to require the railroad to submit supplemental lists of tracts which were free from other claims and those to which adverse claims were asserted, despite the fact that a homestead application was filed by another before the railroad filed its supplemental lists. In affirming the validity of the railroad's selection the Department said:

The selection, in so far as the tracts free from adverse claim were concerned, was, in fact, treated, and properly so, in the nature of a new selection, effective and pending from and after the date of receipt of the Commissioner's letter by the local officers, but not prior thereto.

It devolved upon the Department, as hereinbefore stated, to dispose of said lists under the law then in force and the action taken by the Commissioner was to relieve from suspension the railway selection. The land at the date the Commissioner took that action, being subject to appropriation by the railway company and the railway company having at all times prior thereto manifested its desire and intent to select the same, it would have been a useless and burdensome requirement to compel the railway company to file new selection papers, practically a duplication of the selection then before the Department. The original selection could have been and was allowed as to the tracts free from adverse claim, as above stated, irrespective of the supplemental lists. The supplemental lists were in nowise a prerequisite of the taking of appropriate action on the original selection under the act of March 3, 1911, *supra*.

It is, therefore, held that movant, not being a party in interest at the date of receipt of the Commissioner's letter of September 30, 1913, by the local officers,

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will not be heard to question the Department's authority to relieve from suspension the pending railway selection, the disposition of which appears regular and in accordance with law. *Trott v. Northern Pacific Ry. Co.*, 45 L.D. 193, 196 (1916).

Again we see that the Department need not insist upon a mere formality when there are no adverse rights to be considered. Here, the State has at all times shown its intention to acquire the selected lands and it would have served no useful purpose to require it to file a duplicate of the application already on file.

Therefore, we conclude that the amendments filed by the State during and after the preference right period were reaffirmations of the State's original selection and, in the circumstances, are to be treated as though the State had refiled its original application at the time of the amendments.<sup>11</sup>

There remains Kalerak's contention that the State has alienated or bargained away its authority to make selections in violation of the prohibition in 6(g) of the Statehood Act, *supra*. There is no evidence to support this charge. The mere fact that the State is making a selection for land that the city desires does not mean that the State has sold or otherwise disposed of its authority to make this selection or any other.

In his supplemental pleadings on appeal Kalerak has raised several new issues. First, in rebuttal to an assertion of the State, he denies that the lands sought by Kalerak and others are necessary to protect the watershed. This issue is irrelevant, for the validity of the State's selection does not depend on the purpose for which it is made. The statute requires no particular purpose to justify a selection and none is required by the Department. The State's motivations are its own concern.

Next Kalerak urges that the U.S. District Court for the District of Alaska has already decided the case in *Taylor et al. v. Greater Anchorage Area Borough et al.*, No. A-91-65 Civ., October 15, 1965. This was an action by several homestead settlers or entrymen to enjoin the

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<sup>11</sup> It is also interesting to note that the practice of allowing a State to file premature applications so long as it did not prejudice any applicant filing on the day the lands became available is not of recent origin. For a time State selections filed prior to the filing of a township plat of survey were recognized as being filed on the proper date and in turn after all those present at the land office at the time of opening on the proper date. *State of California v. Koontz et al.*, 32 L.D. 648 (1904); 33 L.D. 643 (1905).

The Department soon formalized its practice by a regulation limiting the State to a period of three days prior to the regular opening day in which to submit premature selections. Regulations paragraph 12, June 23, 1910, 39 L.D. 39, 41 (1910). This provision was later omitted from the regulation, 43 CFR, 1938 ed., 270.12.

Borough from restricting the plaintiffs from full enjoyment of their rights under the homestead laws, or, specifically, from preventing the plaintiffs from access to or erecting structures on their homesteads. The Court issued a preliminary injunction effective only against the Borough which it said would "remain in effect until the Department of Interior has determined the dispute now appealed to it by the State of Alaska in the Kalerak case."

The Court emphasized that the injunction would not apply to either the State or Alfred P. Steger, described in the complaint as "Chief Records and Public Service, Anchorage District and Land Office, Bureau of Land Management."

While the Court did say that it found the State's original selection was "invalid against the rights of any others lawfully claiming rights under or against rights to said Federal Land," it also recognized that the issue was before the Secretary on appeal and that it would reexamine the matter when the Department had rendered its decision. In other words, it was not attempting to supersede the Secretary's duty to dispose of the appeal or to substitute its judgment for his. The Secretary remains free to examine the issues and to decide the case in accordance with his understanding of the law.

Finally, Kalerak has requested that an oral argument be held primarily to present his position that the lands in his entry are not needed to protect the watershed with which the City of Anchorage is so concerned. As we have seen, the controlling issues in the case are legal, not factual, and the issue of whether all or any of the selected lands are part of the watershed is not really material to their resolution. The issues have been extensively briefed and oral argument would add little, if anything, to the written discussions. Therefore Kalerak's request for oral argument is denied.

Pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A (4) (a); 24 F.R. 1348), the decision of the Chief, Office of Appeals and Hearings, Bureau of Land Management, is reversed and the decisions of the land office refusing to record the several notices of occupancy or settlement are affirmed.

EDWARD WEINBERG,  
*Deputy Solicitor.*

## APPEAL OF AMERICAN LIGURIAN COMPANY, INC.

IBCA-492-4-65 *Decided January 21, 1966*

**Contracts: Construction and Operation: Subcontractors and Suppliers—  
Contracts: Performance or Default: Excusable Delays—Contracts:  
Disputes and Remedies: Burden of Proof**

The contracting officer's determination on a contractor's entitlement to a time extension, by reason of alleged excusable causes of delay, will be sustained where the contractor fails to show that such determination is erroneous by a preponderance of the evidence and where it appears that the unexcused delays were attributable to manufacturing difficulties of a subcontractor or to a failure of the subcontractor's quality control.

**Contracts: Performance or Default: Excusable Delays—Contracts: Construction and Operation: Waiver and Estoppel—Contracts: Construction and Operation: Subcontractors and Suppliers**

A contractor who bids on a Government contract unqualifiedly represents that it has the supervision, personnel, equipment, skill and ability to do the work and its responsibility is in nowise diminished by the fact that entire work covered thereby has been subcontracted; consequently, the absence of such qualifications is not an excusable cause of delay under the standard form of supply contract.

**Contracts: Disputes and Remedies: Jurisdiction—Contracts: Construction and Operation: General Rules of Construction—Contracts: Disputes and Remedies: Damages: Liquidated Damages**

A contractor's request that the liquidated damages assessed for an unexcused delay be substantially reduced was denied, where it was found that contract language clearly authorized the assessment made and where, consequently, the Board was without jurisdiction in the matter, irrespective of whether the request were to be viewed as asking reformation of the contract or seeking remission of liquidated damages.

**Contracts: Disputes and Remedies: Damages: Liquidated Damages—Contracts: Performance or Default: Generally—Contracts: Disputes and Remedies: Damages: Actual Damages**

Liquidated damages provisions in contracts are valid and enforceable if, judged at the time of contract, they bear a reasonable relationship to the damages which could be expected to flow from delayed performance, and where the amount of possible actual damages would be difficult or impossible of ascertainment in advance, notwithstanding the fact that the actual damages sustained by the Government are uncertain in amount and even though the liquidated damages assessed may have constituted a hardship to the contractor because the amount thereof represented a high proportion of the contract price.



## BOARD OF CONTRACT APPEALS

The contractor has appealed from the contracting officer's Finding of Fact of April 19, 1963,<sup>1</sup> and the Supplemental Findings of Fact of October 14, 1964,<sup>2</sup> under which liquidated damages for delayed deliveries were assessed in the amount of \$11,450. Neither party has requested a hearing. Accordingly, the case will be decided on the basis of the administrative record (appeal file).

The contract, which was dated June 30, 1960, was on Standard Form 33 (Revised October 1957) and incorporated the General Provisions of Standard Form 32 (October 1957 Edition) for supply contracts. It called for furnishing of three potential transformers at a price of \$4,935 per unit, resulting in a total contract price of \$14,805.

The contractor's bid disclosed that the transformers to be furnished (Item 1 of the invitation) would be manufactured by Scarpa E Magnano<sup>3</sup> at its plant in Milano, Italy. Under the terms of the invitation the three potential transformers were required to be shipped within 100 calendar days after date of receipt of the award of contract.<sup>4</sup> As the notice of award was received by the contractor on July 5, 1960, deliveries were scheduled for completion on or before October 13, 1960. Deliveries were not, in fact, completed until November 28, 1961, or some 411 days after the scheduled completion date. The contract provided for the assessment of liquidated damages for

<sup>1</sup> Transmitted by letter of May 9, 1963, from which a timely appeal was taken.

<sup>2</sup> Apparently due to funding problems the supplemental findings were not forwarded to the contractor until February 26, 1965. The notice of appeal therefrom was undated and was not recorded as received by the contracting officer until April 5, 1965. The appeal was not sent by "Certified Return Receipt Requested" mail, as apparently was contemplated, and the envelope in which the appeal was transmitted was inadvertently destroyed. While expressing doubt as to the timeliness of the appeal, the contracting officer nevertheless noted that "a timely mailing on April 1, airmail, special delivery, as represented by the appellant, would, according to the best evidence available, have resulted in delivery on April 2, 1965." Probably because of the conflicting and incomplete nature of the evidence available, the Government has not raised an issue as to the timeliness of the appeal. Due to these considerations, and to the extent of the Government's involvement in the matter (i.e., the destruction of the envelope in which the appeal was transmitted), the doubt has been resolved in favor of the contractor and the case has been considered on the merits.

<sup>3</sup> Frequently referred to as Scarpa & Magnano by the contractor and hereinafter so identified.

<sup>4</sup> In pertinent part Paragraph 2 of the Special Provisions reads:

"2. *Delivery—urgency of.* (a) *Shipment.*—Time of delivery is important and complete shipment from the shipping point or points is desired within 100 calendar days after date of receipt by the contractor of notice of award of contract. (NOTE: For a bidder furnishing equipment of foreign origin or manufacture, shipment within the meaning of this invitation will be considered as having been made when the materials or equipment are properly loaded on cars at a United States port of entry or ports of entry and ready for movement to the destinations.)"

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delay in delivery at the rate of \$50 per day.<sup>5</sup> Liquidated damages were not assessable, however, for delays in delivery attributable to excusable causes of delay as defined in Subparagraph (c) of Clause 11, "Default," of the General Provisions.<sup>6</sup>

### *Excusable Causes of Delay*

Following the completion of deliveries the contracting officer afforded the contractor an opportunity to establish that the delays involved were due to excusable causes of delay within the meaning of the Default clause. Scarpa & Magnano furnished the contractor with a number of documents in support of the contention that all delays were excusable. From Scarpa & Magnano's letter of transmittal<sup>7</sup> and from the documentation forwarded therewith it appeared that the difficulties which had impeded contract performance included (i) strikes, (ii) the exodus of skilled workers from Italy to other European countries, (iii) delay in the receipt of the required insulators from a supplier due to an accident in baking the porcelain, (iv) dam-

<sup>5</sup> Paragraph 3 of the Special Provisions reads in pertinent part:

"3. *Delays—liquidated damages.* Clause No. 11 entitled 'Default', Standard Form 32, October 1957 edition, is hereby supplemented by the addition of the following paragraph:

"(g) If the contractor refuses or fails to make shipment of the materials or supplies within the desired time specified in the invitation \* \* \* such time to include any duly authorized extensions thereof, the actual damage to the Government for the delay will be impossible to determine, and in lieu thereof the contractor shall pay to the Government, as fixed, agreed, and liquidated damages for each calendar day of delay in making shipment, the amount as set forth below, \* \* \*. *Provided, further,* That the contractor shall not be charged with liquidated damages when the delay in shipment is due to excusable causes as defined above in Subparagraph (c), of this clause \* \* \*.

"The amount of liquidated damages to be charged for failure to ship the transformers, or any part thereof under the schedules, within the desired time specified in the invitation, or within the period stated by the contractor in his bid, if such period is greater than the desired time, will be fifty dollars (\$50) for Item 1, for each calendar day of delay."

<sup>6</sup> "(c) Except with respect to defaults of subcontractors, the Contractor shall not be liable for any excess costs if the failure to perform the contract arises out of causes beyond the control and without the fault or negligence of the Contractor. Such causes may include, but are not restricted to, acts of God or of the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather; but in every case the failure to perform must be beyond the control and without the fault or negligence of the Contractor. If the failure to perform is caused by the default of a subcontractor, and if such default arises out of causes beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either of them, the Contractor shall not be liable for any excess costs for failure to perform, unless the supplies or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the Contractor to meet the required delivery schedule."

<sup>7</sup> In the latter part of May 1962, a letter from Scarpa & Magnano under date of May 14, 1962, was presented to the contracting officer in person by a representative of the contractor. This letter and the documentation which accompanied it were the principal data considered by the contracting officer in the initial findings.

age to an insulator in an accident during transit, and (v) repeated failures of transformer on tests.<sup>8</sup> As to the strike, Scarpa & Magnano noted that the strike had ended on January 3, 1961,<sup>9</sup> and that from June 30, 1960 (the date of award) until that date there had been a total of 29 strike days.

In the finding of fact of April 19, 1963, the contracting officer found that contract performance had been excusably delayed a total of 28 days representing the number of days of strike between the date of receipt of award by the contractor (July 5, 1960) and the date the strike terminated (January 3, 1961). Upon reviewing the appeal from this finding, the contracting officer concluded that some of the data submitted indicated additional relief might be in order. Accordingly, by letter of July 1, 1963, he requested the contractor to furnish "detailed information as to the exact days or in what manner the nationwide strike affected production in the Scarpa & Magnano plant."

Subsequently, by letter under date of December 30, 1963, Scarpa & Magnano forwarded a declaration<sup>10</sup> from the Manufacturers' Association of the Province of Savona certifying "in what manner the nationwide strike affected production in our plant." The factors of delay covered by such declaration include (a) partial strikes of small duration, (b) the refusal of employees to work overtime up to July 31, 1961, (c) the piece work coefficient of workers having been held to a minimum, (d) the emigration of specialized workers to other European countries, and (e) the abnormal increase in absences due to illness. On the basis of the factors previously enumerated the statement concluded: "\* \* \* owing to the reasons listed at points a, b, c, d, and e, the production of Scarpa & Magnano suffered effective delays corresponding to a period of 157 days, to be added to the strike days said in our statement of January 16th, 1962. \* \* \*" <sup>11</sup>

Thereafter, the contracting officer advised the contractor that the information so provided did not disclose what portion of the 157 days applied to the period subsequent to July 5, 1960 (the date of receipt of

<sup>8</sup> On the initial tender (November 14, 1960) three potential transformers were submitted for test but only one passed. Following remanufacture two transformers were tendered for test on February 22, 1961, but again only one passed. Thereafter, the remaining transformer was remanufactured and tendered for tests on three occasions (May 22, 1961, July 22, 1961, and October 27, 1961) before it finally passed.

<sup>9</sup> Letter from Scarpa & Magnano to American Ligurian Company, Inc., under date of May 14, 1962.

<sup>10</sup> This supplements a prior declaration from the Manufacturers' Association which had furnished the basis for the initial finding of 28 days of excusable delay.

<sup>11</sup> January 16, 1961 is the intended reference. This refers to the prior declaration mentioned in note 10, *supra*. The points referred to in the quotation correspond to the factors of delay enumerated in the preceding sentence.

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the award). By letter dated July 8, 1964, the contractor furnished a further statement from the Manufacturers' Association in question advising that the actual delay in delivery time involved during the period from June 30, 1960 to July 31, 1961, amounted to 140 days which should be added to the strike days previously reported.

The material submitted by or on behalf of the contractor after the issuance of the contracting officer's initial findings called attention to the peculiar nature of Italian strikes,<sup>12</sup> and emphasized the extent to which delayed performance of the contract was attributable to the frequency and intermittent nature of such strikes.<sup>13</sup> In addition, the contractor requested that consideration be given to the fact that under a contract for similar equipment with the U.S. Army Corps of Engineers, the contract delivery schedule had been extended, without the application of liquidated damages, on the ground of unusually faulty equipment and strikes.<sup>14</sup>

The peculiar nature of an Italian strike and its likely impact upon contract performance was fully considered by the contracting officer in the Supplemental Findings of Fact of October 14, 1964. Based upon the three statements of the Manufacturers' Association of the Province of Savona, the contracting officer concluded that he would be warranted in finding that there had been an excusable delay of

<sup>12</sup> In the statement forwarded with the contractor's appeal letter of June 5, 1963 Scarpa & Magnano stated: "2. Strikes in Italy have a peculiar characteristic: they do not last without breaks from their beginning up to the conclusion of dealings, but the abstention from work is intervalled of one, two or three days a week, without any rule. \* \* \*"

<sup>13</sup> In the statement referred to in note 12, *supra*, it was further stated: "\* \* \* Owing to this situation Scarpa & Magnano could not perform continuous working cycles—go ahead with operations requiring a continuous assistance of personnel. In this case the situation involved—frequent interruptions in the manufacture of transformers, which produced the failures under para. 1 (referring to the repeated failures on test, note 8, *supra*), being the manufacture in question mainly manual—delay in the operation for the pre-drying of winding in several stages of manufacture and for the fully [sic] impregnation of complete transformers in high-vacuum tanks. The latter operation lasts 15 continuous full days."

<sup>14</sup> In the supplemental findings the contracting officer noted that review of the documents submitted confirmed the granting of an extension of time to the contractor. He concluded, however, that while "conditions may have been similar, each contract must be considered in accordance with its provisions and in the light of the factual circumstances relied upon as a basis for relief." There are significant differences between the two situations among which are: (i) the contract with the Corps of Engineers contemplated delivery within approximately an eight month period as contrasted with the 100 days initially allowed for deliveries under the instant contract, and (ii) the contract with the Engineers was not even awarded until after the instant contract was scheduled for completion. Perhaps even more significant is the fact that the extension granted by the Corps of Engineers amounted to only 117 days or some 65 days less than the extension of 182 days allowed by the contracting officer in the supplemental findings.

164 days.<sup>15</sup> He took special note, however, of the following statement appearing in the contractor's letter of July 8, 1964:

\* \* \* It was felt that the main reason for the various failures could lay in the frequent and intermittently occurring strikes. Actually the various manufacturing operations could not be carried out in continuity, as it is indispensable, but they had to be frequently interrupted and resumed.<sup>16</sup>

Accepting the above quoted statement at face value the contracting officer stated: "\* \* \* Accordingly, it appears appropriate to allow as excusable delay, because of strikes, all of the time from the date the Contractor received award until the end of the strike period, on January 3, 1961, which amounts to a total of 182 calendar days during which continuity of operations could not be attained, due to causes beyond the control and without the fault or negligence of the Contractor." Except for the 182 days of delay which the contracting officer found to be directly attributable to the strike, all other claims of excusable delay were denied.

As previously noted, the contractor has contended that it was excusably delayed by reason of a supplier's late delivery of required insulators and that it was further delayed by an insulator being damaged in an accident during transit. It is unnecessary for us to pass upon the merits of these contentions, however, since the delays attributable to such causes were concurrent with the delays found to be excusable by the contracting officer and, consequently, would entitle the contractor to no further extension in the time for performance of the contract in any event.<sup>17</sup>

The extent to which the contractor may have been delayed by the exodus of skilled workers from Italy and by the refusal of employees to work overtime up to July 31, 1961,<sup>18</sup> are also matters to which no

<sup>15</sup> The 164 days includes the 28 days of delay found to be excusable in the initial findings.

<sup>16</sup> The quoted language is identical to that contained in the letter of July 8, 1964, as contrasted with the language quoted in the supplemental findings which varies slightly from the language and punctuation employed by the contractor.

<sup>17</sup> In the supplemental findings the contracting officer extended the contract delivery schedule to and including April 13, 1961. The delay in obtaining the required insulators had been overcome prior to November 14, 1960 (the date on which the transformers were initially tendered for test). The damage to the insulator in transit occurred on or before March 17, 1961, and according to a cable from Scarpa & Magnano to the contractor involved about a 1-month delay.

<sup>18</sup> The refusal of the workers to work overtime prior to July 31, 1961, does not appear to have delayed performance of the contract in any material respect. Manufacture of the third transformer to pass test was commenced on July 22, 1961, but it was not tendered for test until October 27, 1961, an interval of 97 days. As evident from the information provided in note 8, *supra*, the manufacturing time involved on the two previous tenders on May 22 and July 22, 1961, had involved manufacturing times of only 89 and 61 days, respectively.

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specific consideration need be given. The only convincing evidence offered by the contractor in substantiation of the claimed delays were the various statements from the Manufacturers' Association of the Province of Savona. These disclose that considering such factors, along with other causes for delay, the contractor had only been delayed (during the contract period) a total of 164 days, as contrasted with the 182 days of excusable delay found by the contracting officer in the Supplemental Findings of Fact of October 14, 1964.

The contractor has offered no evidence to support the allegation that the psychological attitude of the workers delayed deliveries under the contract in an appreciable but unspecified amount, and has not corroborated in any way the intimation that the repeated failures of the transformers on test may have been the result of sabotage. Similarly, it has offered no evidence to support its contention that delivery of the third transformer was delayed for 5 days by reason of the holidays incident to Thanksgiving of 1961, assuming that such delays could be recognized as excusable in any case. Unsupported allegations are not, of course, an acceptable substitute for proof.<sup>19</sup>

In the supplemental findings the contracting officer stated that the failure of the transformers on tests appeared to be a matter of quality control and, hence, not beyond the control and without the fault or negligence of either the contractor or its subcontractor within the meaning of Paragraph 11(c).<sup>20</sup> While the contractor has undertaken to contest the accuracy of this statement, the explanation offered appears to be entirely consistent with the contracting officer's view of the matter.<sup>21</sup>

The resort by the contractor and its subcontractor to generalities in explaining the unexcused delay, as well as the failure to offer any proof to substantiate various claims made, appear to stem from their inability to give an adequate explanation for the repeated failure of the third transformer upon test. In fact, the subcontractor has admitted

<sup>19</sup> *Sunset Construction, Inc.*, IBCA-454-9-64 (October 29, 1965), 72 I.D. 440, 65-2 BCA par. 5188.

<sup>20</sup> See note 6, *supra*, for the language of the cited reference.

<sup>21</sup> In the notice of appeal from the supplemental findings the contractor states: "It must be considered that the transformers major insulation consists of pure cellulose kraft paper. The paper is approx. 0.01" thick and is cut in approx. 1" wide strips which are wound on the coil till an approximate 2" thickness is obtained. This operation is completely carried out manually by skilled workmen. If the paper is not wound in a compact way, the voltage tests do not result to be successful. Moreover, if few turns of magnetic wire less or more than the correct number are wound in the coils, the ratio and phase errors can be altered without remedy."

its inability to explain such failures.<sup>22</sup> While such failures have been attributed to the impact of the strike, the subcontractor has not explained how a strike which, according to its own statement, terminated on January 3, 1961, could have affected manufacturing operations during the ensuing 10 months.

The record indicates that Scarpa & Magnano encountered unanticipated difficulties in manufacturing the transformers to meet the specifications of the contract. Manufacturing difficulties encountered by a contractor or a subcontractor are not, per se, a proper basis for a finding of excusable delay.<sup>23</sup> The Government is not responsible generally for finding defects in the contractor's or the subcontractor's manufacturing process.<sup>24</sup> The decisions cited are corollaries of the well-established legal principle that a contractor's bid is an unqualified representation that the contractor has the supervision, personnel, equipment, skill and ability to do the work upon which the contracting officer is entitled to rely.<sup>25</sup>

#### *Application of Liquidated Damage Provision*

The contractor has made a number of suggestions as to the manner in which the liquidated damage provisions should be applied, viz: (i) eliminate or reduce the amount of liquidated damages assessed in recognition of the fact that the "penalties" inflicted on the contractor are not in proportion to the cost of the merchandise and the further fact that the damages resulting to the Government from the delayed deliveries are admittedly uncertain in amount; (ii) add to the extension granted a number of days equivalent to the Sundays and legal holidays included in the period of the extension; and (iii) reduce liquidated damages to  $\frac{1}{3}$  of the amount assessed on the grounds that for all practical purposes two of the three transformers involved were shipped within the contract period as extended by the Supplemental Findings of Fact of October 14, 1964.

<sup>22</sup> "The sequence of unsatisfactory tests on the third transformer was really unusual and unascertainable" (Letter of Scarpa & Magnano to the contractor under date of May 14, 1962). " \* \* \* From what we mentioned above (referring to the repeated test failures) you can easily realize that in the performance of this supply unusual faults took place, the causes of which can be hardly explained" (Statement of Scarpa & Magnano accompanying the contractor's notice of appeal of June 5, 1963).

<sup>23</sup> *Allis-Chalmers Manufacturing Co.*, IBCA-370 and IBCA-373 (April 6, 1964), 1964 BCA par. 4182, 5 Gov. Contr. 281(f).

<sup>24</sup> *Ten Bosch, Inc.*, ASBCA No. 7407 (Mar. 19, 1963), 1963 BCA par. 3696. See also *Montgomery Maier Company, et al.*, IBCA-59 and IBCA-72 (June 28, 1963), 70 I.D. 242, 1963 BCA par. 3819, 5 Gov. Contr. 419 (solution to the problem of stringing wire in difficult circumstances held to be a responsibility of the contractor).

<sup>25</sup> *Sunset Construction, Inc.*, *supra*, note 19.

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As for the first suggestion, it is well established that the propriety of provisions for liquidated damages is to be judged as of the time of making the contract.<sup>26</sup> In the instant case the three transformers covered by the invitation in question and the resulting contract were urgently required to replace three transformers which had exploded. Apparently in recognition of such urgency, the invitation not only requested complete shipment within 100 calendar days from the date of receipt of the notice of award, but expressly provided for bids to be evaluated on the basis of adding \$50 per day for each day that the delivery schedule offered by a bidder exceeded the desired 100 days.<sup>27</sup> The Board concludes, therefore, that viewed at the time the contract was made, the provision for liquidated damages bore a reasonable relationship to the damages which could be expected to flow from delayed performance. The fact that the damages actually sustained may have been less than the amount of the liquidated damages assessed is immaterial;<sup>28</sup> nor is the validity of the assessment affected by the fact that the liquidated damages imposed may have resulted in a hardship to the contractor.<sup>29</sup>

Acceptance of the second suggestion of the contractor would contravene the express language of the contract. Paragraph 2<sup>30</sup> of the Special Provisions refers to shipment being made "within 100 calendar days after date of receipt by the contractor of notice of award of contract," while Paragraph 3<sup>31</sup> of the Special Provisions expressly provides that liquidated damages are to be assessed "for each calendar day of delay in making shipment." That this is the proper basis for assessment is evident when it is borne in mind that the 182 days of delay found to be excusable by the contracting officer were simply projected forward from the date initially established for contract performance of October 13, 1960 (i.e., the 100 days allowed from date of receipt of award included not only work days but Sundays and

<sup>26</sup> *Priebe & Sons, Inc. v. United States*, 332 U.S. 407 (1947); *Southwest Welding and Manufacturing Division, Yuba Consolidated Industries, Inc.*, IBCA-281 (October 29, 1962), 69 I.D. 173, 1962 BCA par. 3564, 4 Gov. Contr. 600, and authorities cited.

<sup>27</sup> In pertinent part Paragraph 2(b) of the Special Provisions reads as follows: " \* \* \* Where the time of shipment, from the shipping point or points, as specified by the bidder, is greater than the desired number of calendar days, each day in excess thereof will be evaluated at fifty dollars (\$50), and bids will be compared on this basis for award of contract."

<sup>28</sup> *Sunset Construction, Inc.*, *supra*, note 19 and authorities there cited.

<sup>29</sup> *Sunset Construction, Inc.*, *supra*, note 19 and authorities there cited.

<sup>30</sup> See note 4, *supra*.

<sup>31</sup> See note 5, *supra*.



legal holidays as well), in establishing the revised delivery date of April 13, 1961, i.e., the date used in computing the liquidated damages to be assessed.

The third suggestion appears to have been made without regard to the limited nature of the Board's jurisdiction. In the instant case the contract clearly states that liquidated damages of \$50 per day are to be assessed "for failure to ship the transformers, or any part thereof \* \* \*" within the time specified.<sup>32</sup> To grant the relief suggested would entail rewriting the contract so as to modify the plain meaning of the provision in question. Embarking upon such an enterprise would be foreign to the Board's jurisdiction, as it has no authority to reform contracts.<sup>33</sup> If the suggestion is to be viewed as a request for the remission of liquidated damages, the matter is also beyond the Board's jurisdiction.<sup>34</sup>

### *Conclusion*

The Board finds that the contractor has failed to establish by the requisite preponderance of the evidence<sup>35</sup> that it is entitled to any extension of the contract delivery schedule in excess of the extension granted by the contracting officer in the Supplemental Findings of Fact of October 14, 1964. The Board further finds that the contractor has not shown that liquidated damages assessed for delayed performance were otherwise improper. Accordingly, the appeal is denied.

WILLIAM F. MCGRAW, *Member.*

I CONCUR:

DEAN F. RATZMAN, *Chairman.*

I CONCUR:

THOMAS M. DURSTON, *Deputy  
Chairman.*

<sup>32</sup> Note 5, *supra*.

<sup>33</sup> *R. & R. Construction Company*, IBCA-413 (September 27, 1965), 72 I.D. 385, 65-2 BCA par. 5109.

<sup>34</sup> *Cosmo. Construction Company*, IBCA-412 (February 20, 1964), 71 I.D. 61, 1964 BCA par. 4059.

<sup>35</sup> *Layne & Bowler Export Corporation*, IBCA-245 (January 18, 1961), 68 I.D. 33, 61-1 BCA par. 2921, 3 Gov. Contr. 87 and authorities there cited.

**HENRY KING MIDDLETON, JR.****A-30059***Decided January 28, 1966***Alaska: Homesteads—Homesteads (Ordinary): Generally—Homesteads (Ordinary): Final Proof—Patents of Public Lands: Generally**

At the expiration of 2 years after the issuance of a receipt upon the final entry of a tract of land under the homestead laws the entryman is entitled to receive a patent if there is no pending contest or protest against the validity of the entry at that time, but, in Alaska, where notice of the filing of final proof has not been published during the 2-year period, the issuance of a patent will be postponed until after notice has been published and the period for the filing of adverse claims has expired.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Henry King Middleton, Jr., has appealed to the Secretary of the Interior from a decision dated May 3, 1963, whereby the Division of Appeals, Bureau of Land Management, affirmed a decision of the Anchorage, Alaska, land office rejecting his final proof and canceling his homestead entry Anchorage 030174.

The appellant's entry was allowed on May 27, 1955. On May 26, 1956, according to his affidavit, the appellant established residence on the entry after making timely application to the land office for an extension of time in which to establish residence. On February 13, 1957, he was inducted into the army for a period of 2 years. Timely notice of this military service was given to the land office.

On August 14, 1959, the appellant filed final proof on his entry, and receipt therefor was issued by the land office. The appellant claimed actual residence on the land from May 25, 1956, to February 12, 1957, and military service from February 13, 1957, to February 12, 1959. He claimed no cultivation of the land but indicated that 10 acres of the entry were plowed in 1959. His final proof also showed that a 10' x 12' house and a tractor trail,  $\frac{3}{4}$  mile in length, were constructed in 1956.

In a decision dated January 4, 1963, the Anchorage land office stated that the final proof showed compliance with the requirements as to residence and improvements, but it rejected the proof for the reason that the entryman had not satisfied the cultivation requirements of the homestead law. It held that the appellant was required to cultivate one-sixteenth of the area of the entry during the second entry year, that since the entryman did not enter the armed forces until

February 13, 1957, he should have cultivated one-sixteenth of the area, or 10 acres, in the second entry year, 1956, that upon the commencement of his military service the appellant's entry was suspended, that the act of October 17, 1940, 54 Stat. 1187, 50 U.S.C. App. § 562 (1964), authorizes the period of military service, not exceeding two years, to be construed as equivalent to residence and cultivation upon the land for the same length of time but that the act does not protect a homestead entryman from failure to comply with the homestead laws before he enters military service, and that the act of September 27, 1944, 58 Stat. 747, as amended, 43 U.S.C. § 279 (1964), provides that no patent shall issue until at least one-eighth of the area entered is cultivated.

In affirming the decision of the land office, the Division of Appeals again cited the act of September 27, 1944, *supra*, as authorizing military service, not exceeding 2 years, to be construed as equivalent to residence and cultivation for the same length of time but requiring cultivation of at least one-eighth of the entry. It held that the entryman was not inducted into the armed services until after the season for cultivation in the second entry year had elapsed, that he was, therefore, required to cultivate one-sixteenth of his entry in 1956 and that he was required to cultivate one-eighth of the entry in the fifth entry year beginning on May 25, 1959.

In his appeal to the Secretary, Middleton contends in substance that:

(1) Since more than 2 years elapsed after the issuance of the manager's receipt for final proof prior to any decision by the land office, the appellant is entitled to a patent as a matter of right under the provisions of section 7 of the act of March 3, 1891, 26 Stat. 1098, as amended, 43 U.S.C. § 1165 (1964); and

(2) The Bureau of Land Management improperly interpreted the act of October 17, 1940, *supra*, and denied the appellant the protection afforded him by that act.

The applicability of section 7 of the act of March 3, 1891, to this case was not discussed by either the land office or the Division of Appeals, although the issue was raised by the appellant in his appeal to the Director, Bureau of Land Management. Section 7 provides in pertinent part:

\* \* \* That after the lapse of two years from the date of the issuance of the \* \* \* [receipt of such officer as the Secretary of the Interior may designate] upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or pre-emption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall

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be entitled to a patent conveying the land by him entered, and the same shall be issued to him; but this proviso shall not be construed to require the delay of two years from the date of said entry before the issuing of a patent therefor.

This provision was made applicable to homestead entries in Alaska by section 1 of the act of May 14, 1898, 30 Stat. 409, as amended, 48 U.S.C. § 371 (1958), unless it is in conflict with the latter, and it must be determined initially whether or not the two statutes are in conflict.

A problem immediately arises, when an attempt is made to apply section 7, *supra*, to a homestead entry in Alaska, in determining when the 2-year period referred to commences to run. In all of the public-land States, with the exception of Alaska, final proof is filed, and a receipt therefor is issued, only after the entryman has fully complied, or purports to have fully complied, with the requirements of the homestead law. All that remains to be done then is for the land office to act upon the proof, *i.e.*, to accept the proof and issue a patent to the entryman or to initiate a contest against the entry or reject the proof for a defect or insufficiency apparent upon the face of the proof. In Alaska, however, final proof is submitted prior to publication of notice of the filing of the proof and, therefore, prior to opportunity being afforded parties claiming interests adverse to those of the entryman to assert their rights. In this situation the land office cannot issue a patent immediately upon the filing of final proof even though the land office believes that the requirements of the homestead law have been met.

The course of action followed with respect to the application of section 7 of the act of March 3, 1891, *supra*, has been fraught with pitfalls, and a review of the cases involving the statute, both administrative and judicial, reveals that the Department has not avoided all of them. Problems have arisen in determining precisely what is required to start the running of the 2-year period of limitation, what is required to stop the running of the period, on whom the statute is binding as a limitation of action, and whether a pending action on one cause will toll the running of the statute as to a different cause of action. While the Department's course has been punctuated with occasional reversals, the answers to all of these questions appear now to have been settled beyond reasonable dispute, at least insofar as the act is applicable to States other than Alaska. See *Lane v. Hoglund*, 244 U.S. 174 (1917); *Payne v. Newton*, 255 U.S. 438 (1921); *Stockley v. United States*, 260 U.S. 532 (1923); Instructions, 12 L.D. 450 (1891); Instructions, 13 L.D. 1 (1891); *Weyher v. Smith*, 13 L.D. 489 (1891);

*Azariah W. Colburn et al.*, 29 L.D. 539 (1900); *Montana Implement Company*, 35 L.D. 576 (1907); *F. M. Pliter*, 38 L.D. 34 (1909); *Jacob A. Harris*, 42 L.D. 611 (1913). From the criteria set forth in these decisions it would appear that the appellant is entitled to the benefits of the statute if the statute is applicable in Alaska upon the same basis as in other States.

In some Departmental decisions it has seemingly been assumed that section 7, *supra*, is to be applied in Alaska in the same manner as in other States. See *Joseph A. Leman*, *Larry M. Oskolkoff*, 59 I.D. 458 (1947); *Audrey I. Cutting*, *George Peter Smith*, 66 I.D. 348 (1959). In both of the cited decisions, however, it was determined that the confirmatory provision of the statute was prevented from taking effect for reasons not relevant to the present case, and the precise question of applicability of the statute in Alaska was not considered.

As we have already noted, the procedure followed in Alaska in filing final proof on a homestead entry differs from that followed in the other States. As to the latter the procedure is as follows:

- (1) The entryman files notice in the appropriate land office of his intention to make final proof;

- (2) Under the direction of the land office manager, notice of the application to file proof is published in a designated newspaper once a week for 30 days, naming the time and place for submission of such proof;

- (3) At the expiration of the period of publication the entryman submits his final proof and pays the required fees, and a receipt is issued therefor; and

- (4) The land office acts upon the proof. 20 Stat. 472 (1879), ch. 192, as amended, 43 U.S.C. § 251 (1964); 43 CFR 2211.1-4.

In Alaska, however, the following procedure is prescribed:

- (1) When the entryman is ready to submit proof, without previous notice of intention, he appears before either the land office manager or any other authorized officer and submits proof of his compliance with the requirements of the homestead law and files the proof in the proper land office with the required fees, and a receipt therefor is issued;

- (2) Under the direction of the land office manager, publication of notice of the filing of final proof is made once a week for 60 days in a designated newspaper;

- (3) During the period of publication and for 30 days thereafter any person or legal entity having or asserting any adverse interest in or claim to the tract of land sought may file an adverse claim in the

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land office where the proof is pending; such adverse claimant must, within 60 days thereafter, begin action to quiet title in a court of competent jurisdiction in Alaska, and no patent will be issued until the final adjudication of the rights of the parties, at which time a patent will be issued in conformity with the final decree of the court; and

(4) Upon the conclusion of judicial proceedings, or at the expiration of the period for initiating such a proceeding if none has been initiated, the land office acts upon the proof. 30 Stat. 413 (1898), ch. 299, § 10, as amended, 48 U.S.C. § 359 (1958); 43 CFR 2211.9-7.<sup>1</sup>

The reason for the different procedure in Alaska was not made explicit by Congress. It would appear that in prescribing the Alaskan procedure Congress contemplated the problems of distances and travel conditions peculiar to Alaska and sought to avoid the hardship that would fall upon entrymen if, as in the other States, they were required, after filing of notice of intention to submit proof, to appear before the proof-taking officer on a specified date. See 31 Cong. Rec. 4508 (1898). Whatever the reason for the procedural change in Alaska, it is readily seen that a significant change was made in the effect of filing final proof and that, in some respects, the filing of final proof in Alaska corresponds more nearly to the filing of notice of intention to file proof in the other States than to the actual filing of the proof.

In *Stockley v. United States*, *supra*, it was argued on behalf of the United States that the receiver's receipt issued to the entryman in that case was not the "receiver's receipt upon the final entry" referred to in section 7 of the 1891 act, *supra*, which started the running of the 2-year period. The argument was based upon the premise that in 1891 a receiver's receipt was never issued until the final proof had been examined and approved, whereas, at the time of issuance of a receipt to Stockley in 1908, the Department's practice had been radically changed, and the receiver's receipt issued in that case was issued without either the register or the receiver passing upon the final proof. The Court, however, rejected this argument, stating that:

\* \* \* A change in the practice of the Land Department manifestly could not have the effect of altering the meaning of an act of Congress. What the act

<sup>1</sup> It is of interest to note that prior to 1923 the same procedure was followed for Alaskan homestead entries as was followed for homesteads in the States, i.e., notice of intention to submit final proof was published before the taking of final proof. On September 10, 1923, the Department instructed the Commissioner of the General Land Office to amend the homestead regulations to provide for the publication of notice after the submission of final proof. Memorandum M.10838 from First Assistant Secretary Finney to Commissioner, General Land Office re homestead entry of Charles J. Young, Juneau 03971.

meant upon its passage, it continued to mean thereafter. The plain provision is that the period of limitation shall begin to run from the date of the "issuance of the receiver's receipt upon the final entry." There is no ambiguity in this language and, therefore, no room for construction. There is nothing to construe. The sole inquiry is whether the receipt issued to Stockley falls within the words of the statute. \* \* \* Having submitted to the proper officials proof showing full compliance with the law, and having paid all fees and commissions lawfully due, Stockley had done everything which the law required on his part and became entitled to the immediate issuance of the receiver's receipt, and this receipt was issued and delivered to him. No subsequent receipt was contemplated or required. From the date of the receipt the entry may be held open for the period of two years, during which time its validity may be contested. Thereafter the entryman is entitled to a patent and the express command of the statute is that "the same shall be issued to him." \* \* \* 260 U.S. at 539.

From the language of the Court it seems indisputable that if the statute is to be applied to Alaska homestead entries at all, the 2-year period of limitation must commence to run with the issuance of the receipt upon the filing of final proof, for there is nothing else equivalent to "the receipt upon the final entry." If the Department were to hold that the 2-year period begins to run upon the occurrence of some other event, such as the publication of notice of the filing of final proof or the expiration of the period for instituting adverse proceedings, it would be substituting its own judgment as to what the law should be for the clear declaration of Congress as to what the law is. Clearly, it cannot do this. Thus, while final proof, when filed in Alaska, may be in some respects less final than the final proof filed in other States, the receipt issued by the manager of the land office upon the filing of final proof is nonetheless the only "receipt upon the final entry."

The problem that seems to arise at this point is that if section 7 is applicable in this case and the 2-year period commenced to run upon the issuance of the receipt for final proof, the Department would apparently be faced with two incompatible requirements. On the one hand, section 7 of the act of March 3, 1891, *supra*, would seem to confer upon the entryman a present right to receive a patent to the entered land from the United States. Section 10 of the act of May 14, 1898, *supra*, on the other hand, precludes the issuance of a patent until after publication of notice and the expiration of the period for a third party to institute adverse proceedings in court. Upon careful analysis, however, there is no real conflict, and the Department is placed in no such quandary.

There are, in all cases of application for patent under the homestead

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laws, two basic questions which must be answered before a patent can be issued:

(1) Has the entryman fully complied with the requirements of the homestead laws to entitle him to receive a patent?

(2) Has anyone else a claim upon the entered land, superior to that of the entryman, which would defeat the entryman's claim of right to a patent irrespective of his compliance with the homestead requirements? It is only when the first question is answered in the affirmative and the second in the negative that the entryman's right to a patent is established.

In all of the States except Alaska, the second question is answered before final proof is filed and before it is necessary to answer the first. In Alaska, the second is not answered until after the filing of final proof, and its disposition may precede or follow the disposition of the first question, depending upon the circumstances.

The proviso of section 7 of the act of 1891, *supra*, goes only to the substance of the first question. That is, it provides, in effect, that within two years after the filing of final proof by an entryman the Department must take some action upon the proof or be precluded thereafter from questioning the entryman's compliance with the homestead laws. The 1898 act, *supra*, while providing a procedure in Alaska with respect to adverse claims of third parties which might require more than two years after the filing of final proof to determine the rightful patentee, need not affect the determination of the entryman's compliance or the rights and obligations existing between the United States and the entryman.

The substance of the matter, whether in Alaska or in another State, is that in filing final proof a homestead entryman alleges his compliance with the homestead laws and his right to receive a patent. He can do no more at that time. The land office must take the next step. In Alaska, as noted earlier, the land office cannot immediately issue a patent to the entryman for the reason that other steps remain to be taken before the issuance of a patent, but it can act upon the proof. The steps to be taken are for parties other than the entryman, and, until the land office acts, no further action is possible. It would be manifestly unfair in principle and untruthful in fact for the Department to say, in such circumstances, that no action had been taken on a final proof for the reason that notice had not been published, when only the Department could cause the notice to be published. Such a



proposition would permit the Department to postpone indefinitely any action on a final proof in Alaska without detriment to the Department's jurisdiction over the land or its authority to act at its convenience. The express purpose of section 7, *supra*, was to avoid the possibility of such consequences resulting from Departmental inaction.

The land office, then, upon the filing of final proof, may contest the proof or reject it altogether without ever ordering publication of notice of the filing of the proof, or it may order the publication of notice. The publication of such notice obviously is for the benefit of parties other than the United States and is of no consequence insofar as action by the Department is concerned. If section 7 is to be applied in Alaska, then, its substantive effect would be identical with that in other States, *i.e.*, it would require the land office to take the action which it must take within 2 years or waive any adverse action on the proof which might have been initiated during that period.

A modification in the procedure followed in other States would be required, however, where, as here, more than 2 years elapsed after the issuance of the final receipt without the initiation of a contest or protest and where publication was not made. In this situation notice of the filing of final proof must still be published, and third parties claiming rights adverse to those of the entryman must be given an opportunity to assert their claims. This does not mean, however, that the land office cannot pass upon the adequacy of the entryman's compliance with the requirements of the homestead laws until the rights of third parties have been determined. On the contrary, if the first question is decided unfavorably for the entryman, it becomes unnecessary to consider the second. It is not only possible, but desirable, where it appears that an entryman has not satisfied the requirements of the homestead laws, to take prompt action toward rejection of the proof and to avoid altogether the necessity for publication and the possible burden of additional proceedings which might follow.

Having determined, then, that section 7, *supra*, can be applied in Alaska without conflict with other provisions of law, peculiar to Alaska, it seems clear that it should be applied. Accordingly, it is concluded that the provision is applicable to homestead entries in Alaska in the same circumstances as in other States and that the 2-year period of limitation commences to run upon the issuance by the land office of the receipt upon the filing of final proof. If no action is taken within that period to challenge the sufficiency of an entryman's

proof, the Department is without authority to challenge it thereafter.<sup>2</sup> Where notice of filing of final proof has not been published within that period, however, issuance of a patent will be postponed until after notice has been published and the period for instituting adverse action has expired. This conclusion seems to be consistent with both the 1891 and the 1898 acts, *supra*, and it is in harmony with the *Leman* and *Cutting* cases, *supra*. It becomes unnecessary, then, to consider other issues raised in the appeal.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4) (a); 24 F.R. 1348), the decision appealed from is reversed, and the case is remanded to the Bureau of Land Management for further action consistent with this decision.

ERNEST F. HOM,  
*Assistant Solicitor.*

### APPEAL OF KORSHOJ CONSTRUCTION COMPANY

IBCA-321

*Decided January 31, 1966*

**Contracts: Construction and Operation: Changes and Extras—Contracts: Formation and Validity: Implied and Constructive Contracts—Contracts: Construction and Operation: Notices**

The provision in the standard Changes clause requiring a contractor to assert a claim for adjustment within 30 days after receipt of a written change order is not applicable where the change was staking of the work by the Government that varied substantially from a contract drawing, accompanied by oral instructions that were never reduced to writing.

**Contracts: Construction and Operation: Changes and Extras—Contracts: Construction and Operation: Protests**

A contractor's claim based upon the fact that the Government's staking for a conveyance channel did not follow a contract drawing for "typical section in cut" excavation work was denied insofar as it concerned losses assertedly sustained in the claimant's own operations as a prime contractor, since the contractor's failure to make a timely protest to the contracting officer was

<sup>2</sup>The statute similarly cuts off any private contest or protest in which the entryman's performance is challenged, for, when the Department can no longer challenge the entryman's compliance with the law it is also precluded from entertaining a similar contest or protest brought by a private individual. See *John N. Dickerson*, 35 L.D. 67 (1906); *Milroy v. Jones*, 36 L.D. 438 (1908).

found, upon review by the Board, to be seriously prejudicial to the interests of the Government.

**Contracts: Construction and Operation: Changes and Extras—Contracts: Construction and Operation: Protests—Contracts: Construction and Operation: Waiver and Estoppel—Contracts: Disputes and Remedies: Equitable Adjustments**

The Board, in reviewing the question of whether the failure to make a timely protest to the contracting officer is prejudicial to the interests of the Government, will review all of the circumstances, and will consider a claim for equitable adjustment on its merits in a situation where it would be unreasonable and inequitable to refuse to waive a protest requirement because of commitments for special equipment made by a subcontractor in reliance upon a contract drawing which the Government did not follow in staking the project.

#### BOARD OF CONTRACT APPEALS

The disputes considered in this appeal involve alleged changes in a contract covering the construction of a drainage system in Arizona. The question of applicability of the notification provisions of Article 3, "Changes," of Standard Form 23A, and of a special "Protests" clause must be resolved.

#### *The Staking Claim*

The major claim (designated as Claim 2 in the record) relates to the staking by Government field forces of "in cut" portions of a conveyance channel. The appellant asserts that the staking did not follow a typical drawing (50-D-3477) included in the contract for "in cut" channel sections. The amount of the claim is \$135,661.75. The appellant's bid for the total project was approximately one million dollars. The appellant did not advise the contracting officer that the claim would be submitted until several weeks after the project was completed—around this fact a great deal of controversy has raged. The Bureau of Reclamation's contracting officer in original and supplemental findings issued on the staking claim has on each occasion expressly invoked the provisions of a special "Protests" clause, Paragraph 9 of the specifications, which states:

*Protests.* If the contractor considers any work demanded of him to be outside of the requirements of the contract, or considers any record or ruling of the contracting officer or of the inspectors to be unfair, he shall immediately upon such work being demanded or such record or ruling being made, ask, in writing, for written instructions or decision, whereupon he shall proceed without delay to perform the work or to conform to the record or ruling, and within thirty

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(30) calendar days after date of receipt of the written instructions or decision (unless the contracting officer shall grant a further period of time prior to commencement of the work affected) he shall file a written protest with the contracting officer, stating clearly and in detail the basis of his protest. Except for such protests as are made of record in the manner herein specified and within the time limit stated, the records, rulings, instructions, or decisions of the contracting officer shall be final and conclusive. Instructions and/or decisions of the contracting officer contained in letters transmitting drawings to the contractor shall be considered as written instruction or decisions subject to protest as herein provided.<sup>1</sup>

The complaint about the staking concerns the slopes of the freeboard for the conveyance channel, where the channel was "in cut." The freeboard slopes were those on both sides of the channel from the top of its concrete line water-carrying portion to the original ground surface. Most of the appellant's project was "in cut." The typical drawing for "in cut" sections shows a 12-foot minimum width operating road on one side of the channel and a 3-foot wide berm on the other side. These features are shown below the natural ground level on the typical drawing and, with respect to each other, are on about the same level above the concrete lined water-carrying portion of the channel. The distance between the level shown for construction of the road and berm, and the top of the lined portion is shown as "1.0' min." At the hearing on this appeal, two well-qualified expert witnesses for the appellant established that to engineers the usual and customary meaning of the abbreviation "min." when it follows a specifically stated distance, is that the work as constructed may not be less than the figure shown;

in addition, it signifies that a contractor cannot be required by a project owner to exceed the stated minimum by more than a few tenths of the listed figure to which the "min." applies.

The Bureau of Reclamation employees who staked the "in cut" portions of the conveyance channel did not follow the typical drawing. The effect of their staking was elimination of the operating road and the berm at levels below the natural ground. If the appellant had followed the staking exactly, the "in cut" sections of the channel, would have been constructed with slopes of  $1\frac{1}{2}$  to 1 from the upper limits of

<sup>1</sup> In interlocutory decisions dated August 27, 1963 (70 I.D. 400, 1963 BCA par. 3848, 5 Gov. Contr. 501), and April 29, 1964 (71 I.D. 152, 1964 BCA par. 4206, 6 Gov. Contr. 256), the Board held, and set forth the basis for its holding, that a decision by a contracting officer not to waive the defense that a claim is untimely is reviewable by the Board, either when the waiver authority is expressly provided by the "Changes" clause or when it is implied, as in the case of a "Protests" clause of the type found in the Korshoj contract.

the lining to the original ground surface. The completed channel has the appearance of a truncated "V." The operating road and the equivalent of the berm run along the sides of the channel above ground level, rather than having been built into its sides in accordance with the indications given on the typical drawing. The Board concludes that the staking for the "in cut" sections of the channel deviated substantially from what is shown on the applicable portion of drawing 50-D-3477.

*Korshoj's Expectations and Protestations*

The appellant in the preparation of its bid had, or should have had, more than an inkling that in actual construction the typical drawing for "in cut" sections of the channel would not be strictly followed. The "Schedule" quantity for channel excavation, included in the specifications, was 286,700 cubic yards. Construction of the project in accordance with the Government's staking required channel excavation of pay quantities approximately 12 percent more than the "Schedule" quantity. The appellant's estimate of the excavation that would have been performed under what the appellant calls the "original design" (i.e., the typical drawing for "in cut" sections) is approximately 430,000 cubic yards. The "Schedule" quantity for overhaul is 10,000 mile cubic yards (a quantity and unit defined in the contract). The overhaul unit price was paid for about 16,000 mile cubic yards for the project as it was constructed. A strict following of the typical drawing for the "in cut" sections would have required payment for twenty times the quantity of overhaul as shown in the "Schedule." If the Government had obtained additional areas for the disposal of excavated material, the amount of overhaul required would have been reduced.

One of appellant's expert witnesses testified that checking "in a preliminary fashion" the "Schedule" quantities against those that would be expected in the course of construction as a contractor contemplates performing it, is a normal and usual practice. However, the appellant's estimator stated that he did not calculate the total anticipated quantity of channel excavation in preparing the bid; instead, he only satisfied himself that there was at least as much excavation of that type as was shown on the bid schedule. His calculations were the basis of the Korshoj bid for the portion of the project that Korshoj (the prime contractor) performed itself as distinguished from the subcontracted work.

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The estimator's calculations were turned over to Mr. Simon Korshoj, the appellant's president and general manager. Mr. Korshoj also discussed the job, prior to bidding it, with Mr. Benner who had inspected the site for the appellant. The estimator did not discuss the job, prior to submission of the bid, with Mr. Benner. Mr. Korshoj testified at the hearing. He is a man of considerable experience and perception, and made the final adjustments in the bid before it was submitted.

The "Schedule" quantities for channel excavation and overhaul are reflected in the Korshoj bid. That bid was not prepared in the expectation that substantially greater pay quantities for those items would be encountered on the project. After it had received the contract the appellant submitted a schedule of excavation which showed a quantity for channel excavation within a few thousand cubic yards of the "Schedule" quantity.

There was other evidence in the drawings that the typical drawing for the "in cut" channel sections had been badly chosen. Keeping the operating road for the channel at the low level indicated by that drawing would have created an unusual situation at points along the channel (such as turnouts or crossings) where special drawings included in the specifications showed the operating road to be at a considerably higher level. One of the appellant's experts testified on this problem as follows:

I, in no way, believe that the construction shown at these turnouts modifies the construction between the turnouts.

Q. How would you accomplish such construction?

A. You have two choices. Either you are going to modify the turnouts, as I have just told you, or you are going to have a warped section that, looking down a conveyance channel or a drainage channel, will have a series of wavy back-slopes on the side, and you would have a condition that would exist at each one of these turnouts where the operating road or the berm would terminate at these turnouts, either that or it would have to go up on the embankment on the south side.

There would have to be a road built up to and over and around the turnouts.

\* \* \* \* \*

Q. The ramps up and over these structures, I think you talked about the wavy lines. If you had to go up and over a structure and come back down again, these ramps couldn't be very steep, could they?

A. No, I think you have misunderstood my answer to that question.

Q. Clarify it, please.

A. I didn't say that this was the thing to do. I think it would look rather odd, to say the least.

A general observation of the expert who made the above statements was that lowering the elevations of crossings would have been the best way to make the details in the typical "in cut" drawing compatible with those in the special drawings; however, he also referred to some of the drawings on which the special sections were shown to slope back to the typical section. The other expert witness for the appellant testified that on some of the special drawings there were notes giving latitude to the contracting officer for issuance of special instructions governing construction of the channel at structures (he did not find this to be the case with respect to the normal cross-section of the channel). In such testimony he referred to the "transition" from an area covered by a special drawing back to the typical section. This would indicate that in his view the ramp or "wavy line" method should have been used to adjust the different levels shown on the drawings for the operating road.

In his denial of the appellant's claims, the contracting officer has relied heavily upon statements made by Simon Korshoj in a lawsuit between Korshoj Construction Company, Inc., and Ryerson Ditch Liners. That suit started prior to the submission of the claims which are the subject of this appeal. Ryerson Ditch Liners was a subcontractor for the appellant, and undertook to perform excavation and concrete work in the lined (bottom) part of the channel. The contracting officer stated that the appellant appeared to be claiming several items from both the subcontractor (Ryerson) and the Government, and asserted that a number of statements made by Mr. Korshoj in the Ryerson litigation were inconsistent with the position taken by Mr. Korshoj's corporation in this appeal. Some of the testimony cited is equivocal and proves little because it does not distinguish sufficiently between "in cut" work as shown on the typical drawing and such work as it was staked by forces of the Bureau of Reclamation. The Board concludes, however, that prior to bidding and in the early stages of contract performance Mr. Korshoj was uneasy about the requirements and details shown on the typical drawing for "in cut" channel excavation. This should have affected his actions in bidding and planning, at least with respect to work of the type that his company had performed for many years. The testimony revealing the doubts that he had is as follows:

Q. And then in all of your planning on this job, and when you put in your bid, you were thinking of the quantity of dirt that appears on the top of Plaintiffs' Exhibit 78 here, were you not?

A. No, sir. We did not calculate the dirt. We assumed the Government's quantities was correct.

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Q. Well, I mean, you were assuming an excavated area or profile then similar to Drawing 4 on Exhibit A, or 50-D-3477; isn't that correct?

\* \* \* \* \*

A. BY THE WITNESS: No, this is not quite correct, Mr. Baker, because we did not know that the one-foot minimum, what extent the government might carry that up.

Q. BY MR. BAKER: According to your letter, sir, you state that you planned your drawing [sic] on the basis of the top drawing on Exhibit 78. And then, page 2, paragraph 2, you say this in Exhibit 75: "We evaluated these items to their pertinence and concluded that the berms which Drawing No. 50-D-3477 would provide were suitable as operation berms for the lining equipment; therefore, it was established that we need not make additional provision outside of pay lines for berms from which the lining equipment could place the concrete lining."

Now, you anticipated, did you not, sir, when you looked at that drawing, that the Ryerson equipment would operate on those berms?

A. No, sir.

\* \* \* \* \*

Q. Does this come about by reason of the fact that you did not know whether or not they would maintain this one-foot elevation or whether they would go on up to a higher elevation?

A. That is correct. I did not know what the one-foot minimum meant, whether it was one foot or seven foot.

In his testimony at the hearing held in this appeal Mr. Korshoj said that he had not considered the drawing containing the "1' min." notation to be ambiguous in any way. He gave as a reason for his uncertainty about the drawing that he had "done work for the Bureau of Reclamation before, and sometimes they make odd interpretations," indicating that his uncertainty just before and just after bidding was as to how the *Bureau* would interpret the drawing. It is clear, notwithstanding his explanation, that at those times Mr. Korshoj was not sure where the operating road and the berm shown on Drawing 50-D-3477 ("in cut") would be located in actual construction.

At the hearing in this appeal, Mr. Korshoj also told about negotiations leading up to the execution of the subcontract:

Q. \* \* \* What did you say with reference to the construction of in-cut sections of this Korshoj project in connection with the 1½:1 slope above the concrete lining?

A. I did not discuss the 1½:1 slope with Ryerson as such, except as I told Mr. Ryerson, and I was not familiar with concrete-lined channels, I told Mr. Ryerson that we would excavate down to the top of the concrete lining, and from the top of the concrete lining, from lip to lip of the concrete lining, it was his baby and he would have to accomplish the work from then on, because I was very con-



cerned about him tearing up our slope on the one-foot minimum and spoiling our road, and all the other—I told him, well, we will excavate as shown on the drawing, as Exhibit “F,” and all the other drawings in this book, to the top of the concrete lining, and it was his baby and if he had to do any additional work that was his lookout, because when we got this done, we were done. \* \* \*

In the “in cut” areas of the project the excavation for the channel from the ground level down to the point where the operations of the lining subcontractor (Ryerson) were to begin was performed by the appellant in the fall of 1960. The elimination of the operating road and berm at levels below the natural ground occurred as a result of the staking placed by Bureau of Reclamation employees as a guide for the appellant’s excavation work. The appellant had performed a great deal of canal excavation work prior to undertaking the job in question, such work being on earth canals rather than concrete-lined canals. Thus, it had available the type of equipment needed for earth canal work—loaders, backhoes, bulldozers, draglines, scrapers, graders, etc. Because it had neither the experience nor the equipment required for the excavation and concrete work to be performed in the lower part of the channel, that work was subcontracted to Ryerson. As to the work it did not subcontract, the appellant was well-informed and experienced.

In September 1960, the appellant’s project manager (Mr. Benner) observed the staking of excavation at the site. He went into the field at that time, looked at the stakes and found:

\* \* \* the stakes didn’t reveal any berms, any cuts, to the 12-foot berm roadway, or \* \* \* a 3-foot berm. They just revealed a cut straight down on a  $1\frac{1}{2}:1$  on the top of the lining. In fact, the stakes were set  $1\frac{1}{2}:1$  down to the top of the lining, and then another stake was setting there showing an excavation down to the floor line of the lined section.

After discovering that the Government’s staking did not correspond to the typical drawing for “in cut” excavation, Mr. Benner returned to his office and called Mr. Stringfellow, the Bureau of Reclamation’s field engineer. Mr. Benner recounted:

\* \* \* I called Mr. Stringfellow, and as I recall I got ahold [sic] of him at home, and I asked him if the stakes that had been set were as they were going to continue staking. And he said yes, as far as I know. I said, well, they don’t show a berm on either side of the ditch, and I was wondering what happened to the berm. Why, he said, we are going to forget that berm.

I said you mean the cut through the berm?

Yes, he said, we are going to forget that.

I said, why forget it?

Well, he said, we just don’t need it.

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I said, well, that makes a little difference as far as the job is concerned, as far as our excavation is concerned, and the plan that we have. We —

Well, he said, we are going to forget the berm anyway, and he was very definite in making that statement that they were going to forget the berm.

Q. Did you have any further conversation with Mr. Stringfellow about this during the course of the work?

A. No, I didn't.

Mr. Benner also recalled that he told a Government inspector in December of 1960 or January of 1961, that backfilling work in sections of the channel after it had been lined would not have been necessary "if we had the berms like the original drawing was."

The above mild complaints by Mr. Benner seem to have been the only suggestions, at or near the time the channel excavation work was performed, that the appellant was displeased by the Government's staking for the excavation.

The appellant asserts that on the basis of the Government's actions on many other extra work items and revisions the appellant could reasonably have expected issuance of a change order covering the staking claim. Some of the items in the change orders involved small sums and obviously were extra work, such as removal or relocation of cisterns. The Government clearly expected to pay other items from the outset, since it wrote letters directing and describing revisions in the drawings—the matter of price was worked out in discussions and correspondence after letters outlining the revisions were transmitted by the Government. The largest change order listed by the appellant is for \$23,295.86, and covers six items of work (some of these items have subitems). In a letter dated September 14, 1961, the appellant's president referred to "numerous conferences" on those items between his representative and those of the Government, and stated:

\* \* \* You requested us to accomplish this work as directed by you, and *you further requested us to keep costs of same and submit our billing for this additional work, at a later date.* \* \* \* (Italics added.)

The Government did not request the appellant to keep costs on the work involved in this dispute; furthermore, there is a stipulation in this appeal that the Government has no cost records on the equipment or man-hours related to the items in dispute in the staking claims; and has no quantity measurements with reference to such items. The Board finds in the action taken on the seven change orders listed by the appellant no course of conduct limiting the contracting officer's right to reply upon protest or notification provisions. The adjustment of

disputes by contracting officers and contractors generally will not be well served by overliberal findings in this area. To the greatest extent possible contracting officers should be able to review and issue decisions upon claims without being concerned about the effect such decisions may have on other claims.

*Application of the "Protests" clause—Changed Excavation Claim*

We have found that the typical drawing provided by the Government for "in cut" channel excavation is deficient and that the appellant's protestations over the Government's staking for the excavation were feeble. The appellant's forces were ready to excavate down to the top of the area that would receive the concrete lining when the questioned staking work was performed. The portion of the claim that is related to such work is for \$69,323.61, made up (1) of \$4,030.06, the difference between payments made under the contract unit prices for excavation work and the claimed total cost to the appellant of excavating the cubic yardage that was paid for under the contract, (2) and of \$65,293.55, referred to as a "margin" on excavation that would have been performed if the work had been allowed to follow the typical drawing for "in cut" work.

An argument advanced by the appellant in support of the claim for work performed by its own forces is that additional handling and leveling of material excavated from the channel was necessary because of the change; in addition, a great deal of the amount claimed is related to the appellant's contention that because of the change it was deprived of about 100,000 cubic yards of excavation. It is also asserted that in some areas the right-of-way furnished by the Government was not wide enough to accommodate the excavated material. That material, from the contractor's standpoint, was in a reduced amount; however, the right-of-way would have been very narrow indeed for the quantities of excavated material that would have resulted from strict adherence to the typical drawing.

The Board concludes that the contracting officer was justified in applying the provisions of Paragraph 9 and refusing to consider the "changed excavation work" (prime contractor's) portion of the claim. We are also convinced that the appellant has exaggerated the effect of the staking upon its own excavation work. As has been noted, Mr. Benner in September 1960, made only a mild oral complaint about the Government's staking. Mr. Korshoj himself observed the excavation of an "in cut" portion of the channel on October 5, 1960, and realized

that the staking had not followed the typical drawing. He testified that he also observed the effect of the Government's deviation from the typical drawing in January or February 1961. When asked why he had not initiated correspondence or conferences with the Bureau of Reclamation with respect to the change, he replied:

Well, I previously stated that we were behind schedule. It was imperative to get the job done prior to the hot weather and within the time specified in the contract, and all I received from the Bureau in my conversations with their various people was mainly criticism, further information. They had ordered us to do much additional work, for which we had received no authorization, no change orders, and there was no reason for me to believe that a change order wouldn't be forthcoming for this additional work, as well as for the other additional work we were performing.

Actually, there was a good reason why Mr. Korshoj should have been concerned about the possible effect of a failure to protest or give notification.<sup>2</sup> Only a few years before this Board had refused to allow recovery on a claim by his company in a decision holding squarely that the claim was barred by the failure of Korshoj Construction Co., Inc., to protest.<sup>3</sup> In later decisions, reliance by this Department's contracting officers upon the "Protests" clause in proper circumstances has been approved.<sup>4</sup>

As to the claims for extra costs assertedly incurred in the appellant's own excavation work the interests of the Government were prejudiced by the lack of protest for the following reasons:

1. The Government could have alleviated problems of rehandling or releveling the excavated materials by obtaining additional right-of-way or disposal areas. In all likelihood rapid acquisition of these land rights would have been feasible. The Bureau of Reclamation has authority to acquire real property by the filing of declarations of taking. Another consideration pointed out by Government counsel is that a report of the Department of the Interior entitled *Bureau of Reclamation Project Feasibilities and Authorizations* (1957 edition)

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<sup>2</sup> The requirements of the special "Protests" clause are more stringent than the statement in Clause 3 of Standard Form 23A that a claim of the contractor for an adjustment under the "Changes" clause must be asserted in writing without 30 days of the notification of change. In this case the Government has not acknowledged that a change was made nor has it issued a written change order; therefore, the "30 day" requirement of Clause 3 is not applicable. *Todd Shipyards Corporation*, ASBCA Nos. 2911, 2912 (January 25, 1957), 57-1 BCA par. 1185; *Lansdale Tube Co.*, ASBCA No. 5837 (July 14, 1961), 61-2 BCA par. 3105.

<sup>3</sup> *Korshoj Construction Co., Inc.*, IBCA-9 (May 2, 1956), 63 I.D. 129, 5 CCF par. 61,867.

<sup>4</sup> *McWaters and Bartlett*, IBCA-56 (October 31, 1956), 56-2 BCA par. 1140; *C. C. Terry*, IBCA-330 (July 30, 1963), 1963 BCA par. 3805; 5 Gov. Contr. par. 405; *Joseph C. Hastings*, IBCA-448-6-64 (January 12, 1965), 1965 BCA par. 4618.

contains a statement (from a document on the feasibility of the Gila Project) that ownership of land required for the project "is largely Federal with a moderate amount of state and some private holdings." Lands patented by the Government after August 30, 1890 are subject to the provisions of the act of that date,<sup>5</sup> reserving to the United States a perpetual right-of-way for ditches and canals constructed by authority of the United States as to all lands patented after that date west of the one-hundredth meridian.

2. The appellant's bid was calculated on the basis of the amount of channel excavation shown in the Government's Schedule. More than that amount was excavated on the job as it was staked. The Board does not view the presence of the "in cut" typical drawing as an absolute promise that the contractor would excavate about 430,000 cubic yards of material—in certain respects the Government and the appellant accorded more importance to the lesser "Schedule" quantity.<sup>6</sup> We find also that there is justification for the Bureau of Reclamation's skepticism about the appellant's claimed loss on the excavation work. That the price per cubic yard was more than adequate originally is indicated by the following testimony of the appellant's estimator:

\* \* \* Now rather than figure the entire excavation, I figured the quantity required for the lining, because that was an exact figure that I could readily obtain. I satisfied myself that there was at least as much excavation as was shown as a bid quantity. Therefore, by setting up and pricing the—what [sic] higher priced, more meticulous excavation required for the concrete lining, I knew that my price would be sufficient. In other words, I would not be hurt if the quantity should be less.

3. Because there was no notification from the appellant of the claimed increase in the cost of excavation the Government had no reason to check, on a day-to-day basis, the necessity for re-handling or re-leveling excavated materials, or to redesign or restake areas where appellant's excavation operations were hampered or restricted.

<sup>5</sup> 26 Stat. 391, 43 U.S.C., sec. 945.

<sup>6</sup> Appellant's claim item of \$65,293.55 for the estimated "lost" quantities of excavation is based on the unsound assumption that it is entitled to the entire anticipated return that would have resulted from excavation of 429,558.77 cubic yards at a unit price of \$0.50 per cubic yard. In computing a portion of the amount to be subtracted from its total expected return appellant has multiplied 343,648.82 cubic yards (the excavation down to the top of the lining) by an estimated and unusually low cost of \$0.28 per cubic yard. Because of the subjective and speculative elements contained therein, it is unlikely that the Board would have sanctioned such a method of calculation if the Board had found appellant to be entitled to an equitable adjustment.

*Overexcavation Claim*

The second major part of the appellant's claim is designated in its claim summary as "overexcavation necessitated by change in design." The Government's staking eliminated construction of the operating road and three foot berm below ground level. The typical drawing showed these features only a short distance above the top of the lined portion of the channel, but in the job as it was staked they were constructed as much as eight or nine feet higher. In the summer of 1960, the appellant entered into the subcontract with Ryerson Ditch Liners. Two of the items of work subcontracted to Ryerson were the excavation of part of the channel (this was for the concrete lining and was the lowermost excavation), and construction of the unreinforced concrete channel lining. The subcontractor then ordered special excavation and lining equipment from a manufacturer. It is understandable that the subcontractor in placing the order for this equipment and the manufacturer in supplying it, would anticipate that the road and the berm on the levels depicted on the typical drawing for the "in cut" portions of the channel excavation, would be at the subcontractor's disposal when the prime contractor had completed excavation of the upper portion of the channel.

The Board is unable to credit the appellant with the prescience that it claims with respect to the lowest (subcontracted) portion of the channel. The appellant's experience with concrete lined channels was not extensive, and it seems not to have been greatly concerned about the staking prior to the time its problems with the subcontractor arose. The appellant proceeded against its subcontractor when the subcontractor's equipment could not operate in the channel as excavated in accordance with the Government's stakes. The record before the Board indicates that the loss of channel width and running areas for lining equipment below ground level that would have been present if the typical drawing had been followed were attributable to actions of the Government, not of the subcontractor.

The stakes for channel excavation were placed in mid-September of 1960. The appellant's project manager found from a field inspection in the latter part of September that the stakes did not follow the typical drawing. The special lining equipment that had been ordered by the subcontractor was delivered to the site of the work on October 15, 1960. Thus, there was little, if any, opportunity for the sub-

contractor to do anything about its commitment to the type of equipment that it ordered and brought to the job. A clear indication in the drawings and specifications as to how the "in cut" channel sections would be staked almost certainly would have avoided the difficulties that came from the fact that the subcontractor's equipment was too wide for the upper (nonlined) portion of the channel as excavated in accordance with the Government's staking.

It was necessary to excavate notches into the channel walls to allow the subcontractor's equipment to operate. When the lining work had been accomplished, it was necessary for the appellant to place backfill material to bring the completed walls of the channel into reasonable conformance with the Government's staking. Unquestionably, it would have been best for all parties involved if the appellant had provided the Government with formal advice that the deviation from the typical drawing had necessitated extra work for the benefit of Ryerson. However, the basic expenses of additional excavation, backfill and cleanup are involved in this claim—not losses of the questionable type advanced in the "changed excavation" claim. It should have been apparent to the Government that such extra work was being performed. The Board determines that there is not a sufficient showing of injury or prejudice to the interests of the Government<sup>7</sup> to warrant denial, under the "Protests" clause, of the claim items described by the appellant as follows:

1. Cost of Overexcavation Necessitated by Change in Design.
2. Cost of Backfill and Furnishing of Overexcavated Material.
3. Cost of Cleaning Backfill Material from Lined Channel and Repair of Deep Valve Assemblies.

Liability on the part of the Government is not found for Item No. 4 of the overexcavation claim. The elements of this item, entitled "Cost of Maintenance and Repair of Concrete Lining Resulting from Change in Design" are found to be too remote, with respect both to effect and time, from the work for which payment has been authorized. The rejected item is \$7,116.58 of the total overexcavation claim of \$66,338.14.

With the appellant's consent the Government has reserved the right to audit the appellant's records and to submit written comments or objections concerning any adjustments to be made in accordance with

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<sup>7</sup> See note 1, *supra*.

this ruling. Such comments or objections shall be submitted within 50 days after receipt of this opinion by the Government. The appellant has reserved the right to supplement the record with respect to damages related to any allowed claim items. That right shall be exercised within 30 days after receipt of this opinion by the appellant.

### *The Earth Embankment Claim*

The second claim made by the appellant is for the cost of constructing 57 earth embankments at points where timber railings were constructed on the project. These trapezoidal-shaped retaining embankments were placed along the channel at the inlet and outlet areas of siphons and county road crossings. The contractor asserts that although the project drawings require construction of only 15 of these embankments, representatives of the Government ordered 72 of them as the job progressed. The claim is for \$1,881.46, and is related to 57 embankments not shown on the drawings. The amount claimed reflects a deduction for a payment of \$283 made by the Government for earth placed in the embankments on the basis of a unit price.

The earth embankment claim was made in a letter that was dated October 26, 1961, from the appellant to the Yuma Projects Office of the Bureau of Reclamation. In that letter 42 additional embankments were mentioned.

A determination issued by the authorized representative of the contracting officer, dated November 9, 1961, did not mention either the "Protests" clause or the 30-day notice provision of the "Changes" clause. It acknowledged that not all of the pipe siphon drawings show embankments placed in the manner depicted on some of the drawings. However, it cited a requirement of Paragraph 46 of the contract's Special Conditions that backfill about structures should be placed "as directed," and concluded:

The above work performed by you cannot be considered additional work since it is required under the contract and provided for in the specifications. Payment will be made in accordance with the provisions of Paragraph 46 of the specifications and I must deny your claim \* \* \*. Final quantities of the backfill material placed within the allowable pay line limits will be included under Bid Item 5 [Backfill About Structures] in the final payment voucher.

In findings issued in 1962, and supplemental findings issued in 1965, the contracting officer cited the notification requirements of the



"Protests" clause,<sup>8</sup> and the fact that the claim had been presented approximately four months after work was completed on the project. He ruled that the contractor's failure to request written instructions or to file timely protest was a sufficient basis to deny the claim; in addition, he made statements in the findings in support of an observation that the contractor's claim is without merit in any event. These statements refer to "areas" in which the drawings indicate that some embankments should be constructed. In the supplemental findings an explanation of why the protective berms were constructed is provided, and references are made to facts concerning the berms as recorded in the project records. These conclusions were not supported in any way at the oral hearing.

The Board finds that under the contract the appellant was required to construct only 15 of the trapezoidal embankments in question. More than 50 additional embankments of this type were required to be constructed. This was extra work for which the appellant should be given an equitable adjustment. In reaching this conclusion the Board has taken into account the determination issued in 1961 by the contracting officer's authorized representative, the fact that we are considering a series of small items of extra work performed late in the job, and the long and comprehensive estimating experience of engineers in the contracting agency. The parties have agreed that the Board should not decide the amount of the price adjustment. The Government shall have the right to determine the exact number of embankments that should be paid for (this apparently is in the range between 53 and 57) and to conduct an audit or otherwise check the amount claimed.

### *Summary of Opinion*

The claim for \$69,323.61 (changed excavation work) is denied. The claim for overexcavation and related work is sustained as to entitlement to the extent indicated above and is otherwise denied. The earth embankment (berm) claim is sustained as to entitlement. The appeal is remanded for negotiation of the equitable adjustments.

DEAN F. RATZMAN, *Chairman.*

I CONCUR:

I CONCUR:

THOMAS M. DURSTON, *Deputy  
Chairman.*

WILLIAM F. MCGRAW, *Member.*

<sup>8</sup> See note 1, *supra*.

**APPEAL OF LINCOLN CONSTRUCTION COMPANY****IBCA-438-5-64***Decided February 4, 1966***Contracts: Disputes and Remedies: Equitable Adjustments—Contracts:  
Disputes and Remedies: Damages: Measurement**

The Board of Contract Appeals has inherent authority to arrive at an equitable adjustment by means of an approximation, where the total cost of performance has been established by a preponderance of the evidence and it is not possible to calculate the adjustment with mathematical precision.

**Rules of Practice: Appeals: Generally**

A motion for reconsideration of a decision will be denied where the grounds upon which the motion is based are not valid or have been given full consideration by the Board in arriving at the decision.

**BOARD OF CONTRACT APPEALS**

The Government has requested that the Board reconsider its decision dated November 26, 1965,<sup>1</sup> in the above-entitled matter, pursuant to 43 CFR 4.15, citing 16 specific grounds. The Government's motion is opposed by appellant, which has filed a brief in support of its position.

The first of the arguments advanced by the Government is the unsupported statement that the award made to the appellant was contrary to the law and the evidence. The costs claimed by appellant were detailed item by item in appellant's testimony at the hearing. Such testimony included extensive cross-examination by the Government. No evidence was introduced by the Government which would tend to cast any doubt upon the accuracy and veracity of appellant's evidence of its costs of performing the contract. It is clear from the record that appellant has established its costs by an overwhelming preponderance of the evidence. In these circumstances the Board does not perceive any justification for the vague assertion that the award was contrary to the law and the evidence.

The second ground is similar to the first, that the award of \$36,000 is arbitrary and is not supported by the law or by the evidence. No reasons are furnished in support of this allegation, and we consider that it has been sufficiently dealt with in the preceding paragraph and in the decision itself.

The third ground is to the effect that the equitable adjustment referred to by the Board was not made on an objective or reasonable

<sup>1</sup> *Lincoln Construction Company, IBCA-438-5-64* (November 26, 1965), 72 I.D. 492, 65-2 BCA par. 5234.

cost basis. To the extent that this objection refers to the lack of a precise mathematical method of calculation it is conceded to be true. This is immaterial, however, where, as here, it is not possible to determine the amount precisely.

The fourth reason concerns the alleged absence of reasonable evidence upon which to base a "jury verdict method" of arriving at an equitable adjustment. To the contrary, the record amply substantiates the equitable adjustment to which the contractor was found to be entitled. The payrolls used were those that had been furnished to the Government during contract performance. The hourly rates for equipment were derived from the Associated Equipment Dealer's Manual, and the hours worked by each machine were noted and recorded in the contractor's regular course of business, at the same time that the payrolls were compiled. The Board has found no support in the record for the Government's allegation that the increased costs claimed were not based on convincing proof, or that there was no reasonable evidence on which to make a sound decision.

In its fifth allegation the Government complains that the Board "acted contrary to the law in reforming the contract" instead of making the equitable adjustment provided by the Changes clause of the contract. As the Board said in *Merritt-Chapman & Scott Corporation*:<sup>2</sup>

\* \* \* Obviously, the Board did not err. The Board's authority, to arrive at decisions which may involve holdings as to values somewhere between the disparate claims of the adversaries before it, is, of course, inherent.

No reasons are given for the conclusions stated in the sixth and seventh objections listed by the Government, that the "jury approach" is not an "equitable adjustment" and "raises a question of law and this action by the Board is, therefore, not final as to the Government." Such mere conclusions are insufficient for purposes of reconsideration. The Board's decision was based on equitable principles and well-supported costs, and the proper functions of the Board were exercised in arriving at the amount of the equitable adjustment.<sup>3</sup> As the Board stated in *Eastern Maintenance Company*:<sup>4</sup>

The Board is cognizant of the limitations on its powers "to do equity" outside of the four corners of the contract. That lack of jurisdiction does not, however, restrict the Board's power to act equitably within the four corners and to make an equitable adjustment promised to the contractor by the explicit

<sup>2</sup> IBCA-240 (March 15, 1962) 69 I.D. 11, 1962 BCA par. 3321.

<sup>3</sup> *Cosmo Construction Company*, IBCA-412 (February 20, 1964), 71 I.D. 61, 1964 BCA par. 4059. "The authority given to the Interior Board of Contract Appeals is broader than the authority given to the Armed Services Board of Contract Appeals \* \* \*."

<sup>4</sup> IBCA-275 (November 29, 1962), 69 I.D. 215, 1962 BCA par. 3583.

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terms of the contract. Accordingly, what the contracting officer, through inadvertence or error, has failed to do by way of completing such an equitable adjustment, the Board will do.

The Board considers that its power to make an equitable adjustment provided by the contract, by means of an approximation or "jury verdict approach," is no longer an open question.<sup>5</sup> The Armed Services Board of Contract Appeals has used the same method on several occasions.<sup>6</sup>

Several of the remaining 9 points raised by the Government's motion are repetitious, being rephrased variations of the matters already discussed, and having to do with allegations that the Board reformed the contract and did not make an equitable adjustment.

In points 9, 10, 11 and 13, the erroneous assumption is made that in calculating the number of cubic yards of fill actually placed in the dike (paid for on a lineal foot basis), the Board altered or reformed the bid price in order to compute the additional compensation due the contractor. The Board did not increase the bid price in arriving at the equitable adjustment. Rather, the Board used those figures to show that the contractor's bid was too low for the purpose of recouping its estimated average price of \$0.543 per cubic yard. Hence, this circumstance was one of the "minus" factors considered by the Board in reducing the amount claimed by the contractor, from \$66,875.86, to \$36,000.

In points numbered 12 and 14 the criticism is offered that the Board erred in failing to remand the appeal to the contracting officer for making the equitable adjustment. There is no duty or obligation on the part of the Board to remand for that purpose unless the parties have so stipulated on the record. This occurs where the parties agree that the Board will first consider only the question of liability and no evidence of costs or damages is offered pending the determination of liability. The Board does not favor that procedure unless the parties at the time of the first hearing are not prepared to offer evidence of damages. When the appeal is thus divided, two appeals may be required instead of one, accompanied by loss of time and additional ex-

<sup>5</sup> *Western Contracting Corporation v. United States*, 144 Ct. Cl. 318 (1958); *Henly Construction Company*, IBCA-249 (December 7, 1961), 68 I.D. 348, 61-2 BCA par. 3240, 4 Gov. Contr. 49(b); *Flora Construction Company*, IBCA-180 (June 30, 1961), 61-1 BCA par. 3081, 3 Gov. Contr. 468; *Caribbean Construction Corporation*, IBCA-90 (Supp.) (September 22, 1959), 66 I.D. 334-38, 59-2 BCA par. 2322, 1 Gov. Contr. 666. See also *Fred E. Hicks Construction Company*, IBCA-271 (October 20, 1961), 61-2 BCA par. 3165, 3 Gov. Contr. 49(a); *Lake Union Drydock Company*, ASBCA No. 3073 (June 8, 1959), 59-1 BCA par. 2229.

<sup>6</sup> E.g., *Johnson, Drake and Piper, Inc. and D. R. Kincaid, Ltd.*, ASBCA Nos. 9824 and 10199 (May 26, 1965), 65-2 BCA par. 4868.

pense, and with the further result of denying to the contractor his right to timely remedial action.<sup>7</sup> The record before us is entirely devoid of any suggestion that the appeal should be remanded for equitable adjustment in the event that the Board should find for appellant as to liability. On the contrary, considerable evidence was received respecting the costs incurred, as we have noted earlier in this opinion.

The last contention (No. 16) is that the Board erred in finding that the dispute over the assessment of liquidated damages was properly before the Board as an appeal. The Government considers that the contractor did not reserve this matter in the release of claims dated May 1, 1964. As pointed out in appellant's brief, and as it clearly appears in the record, this item was reserved in the contractor's release by reference to its "request for additional compensation due to change of conditions \* \* \* as contained in our letter dated February 28, 1964, and Notice of Appeal this date [May 1, 1964] filed." On page 4 of the contractor's letter of February 28, 1964, there appears the following statement after a description of the adverse conditions of flooding and working in salt water: "\* \* \* we have not as yet been allowed sufficient consideration on time \* \* \*." In paragraph 11 of the Notice of Appeal there are more extensive references to previous requests for additional time and an unmistakable statement concerning the claim of excusable delay: "In view of the above facts contractor should not be assessed any liquidated damages \* \* \*."

The fact that the reservation in the Release of Claims consists of references to extraneous documents that previously have been or are contemporaneously being transmitted to the contracting officer, does not affect the validity of the reservation.<sup>8</sup> It is true that a claim first made in a Notice of Appeal, and not previously considered by the contracting officer, is not within the jurisdiction of the Board. Such an appeal would be premature.<sup>9</sup> However, that is not the case here. The contracting officer's Findings and Decision contains a reference to the contractor's claim concerning insufficient consideration as to extra time. The decision goes on to describe the contractor's last previous request and the granting of that request for an extension of 18 days. The implication is clear that the contracting officer considered the contractor was not entitled to any further extensions of time. Hence, the claim was given consideration and in effect it was

<sup>7</sup> *Eastern Maintenance Company*, note 4 *supra*.

<sup>8</sup> Cf. *Triangle Construction Company*, IBCA-296 (March 2, 1964), 71 I.D. 73, 1964 BCA par. 4129.

<sup>9</sup> *Cosmo Construction Company*, Note 3 *supra*.

denied, even though the contracting officer used no specific words of denial.

*Conclusion*

The Government's Motion for Reconsideration is denied.

WILLIAM F. MCGRAW, *Member.*

I CONCUR:

THOMAS M. DURSTON, *Deputy Chairman.*

I CONCUR:

DEAN F. RATZMAN, *Chairman.*

OLA N. McCULLOCH SIBLEY

A-30397

*Decided February 15, 1966*

**Mining Occupancy Act: Principal Place of Residence—Mining Occupancy Act: Qualified Applicant**

Where a mining claimant resided upon an unpatented mining claim for twenty years or more prior to October 23, 1962, and constructed thereon substantial improvements, intended to serve as the permanent residence of the claimant, but, prior to that date, moved for a time from the mining claim and rented the improvements to other parties for residential use, the claimant may be found to have been, on that date, a "residential occupant-owner" of such improvements as "a principal place of residence" within the meaning of the act of October 23, 1962, where it appears that the claimant's removal was for good reason and was not voluntary, the evidence shows that during the entire period in which the property was rented the claimant reserved a portion of it for her own use, and there is credible evidence that on October 23, 1962, the claimant was actually residing on the claim.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Ola N. McCulloch Sibley has appealed to the Secretary of the Interior from a decision dated October 27, 1964, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed a decision of the Sacramento, California, land office rejecting her application, Sacramento 077644, filed pursuant to the Mining Claims Occupancy Act of October 23, 1962, 76 Stat. 1127, 30 U.S.C. §§701-709 (1964), to purchase a tract of land embraced in the unpatented Gopher Quartz lode mining claim in sec. 8, T. 6 N., R. 10 E., M.D.M., California. The application was rejected for the reason that Mrs. Sibley

did not occupy a valuable improvement in an unpatented mining claim as a principal place of residence on October 23, 1962.

The record shows that the Gopher mining claim was located on July 2, 1921, that it was quitclaimed on February 1, 1936, to the appellant's first husband, Hobart McCulloch, who, in turn, conveyed the claim to the appellant shortly before his death in August 1960. It further indicates that a home was built on the claim in 1940 in which the appellant and her husband lived until his death.<sup>1</sup> Since that time the appellant has rented the home to various parties except during the period from October 1962 to October 1963, during which time she claims to have resided on the claim with her present husband, Mr. Sibley. On February 11, 1964, the appellant filed her application to purchase the land on which her home and other improvements were constructed, and on February 26, 1964, the Gopher mining claim was declared null and void after the appellant failed to answer a contest complaint filed against the claim on December 18, 1963 (Sacramento 077201).<sup>2</sup>

In affirming the rejection of the appellant's application, the Office of Appeals and Hearings held that the record shows that the mining claim site has not constituted a principal place of residence for the appellant since August 1960 but that the house has been rented for financial gain, that the appellant has not resided on the mining claim since August 1960 except on weekends and that in such circumstances the occupancy is properly construed as "casual or intermittent" and is expressly excluded from favorable consideration by the regulations.

The Bureau's decision was based in part upon a report of investigation which disclosed, *inter alia*, that none of the renters of the appellant's house after August 1960 were caretakers of the property or were obligated to care for the appellant in case of illness, that the appellant reserved one room of the house for storage of her personal belongings but that there were no agreements with the tenants whereby the appellant was permitted to come and go or stay at the house at her will, that the appellant's voting registration in Amador County, in which the subject land is situated, was canceled in December 1960 and that the appellant registered as a voter in San Joaquin County on April 11, 1962, that records obtained from the local power company of electric

<sup>1</sup> According to the appellant's application, the home was enlarged and completely rebuilt in 1955.

<sup>2</sup> In her application, Mrs. Sibley stated that "I am relinquishing the Nuggett [an adjoining mining claim] without a written protest" and that "I had a letter from your office stating both claims had been made invalid." Since her application was filed prior to the decision declaring the claims to be null and void, it is not entirely clear whether she meant that she was admitting the charges of the complaint or whether she understood the complaint, itself, to be a determination that the claims were invalid.

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power consumption from October 1962 to October 1963 indicated that no one was living in the house on a full-time basis during that period, that the appellant attempted to sell her home to the current tenants in 1963 or 1964, and that Mr. Sibley stated during the spring of 1964 that his wife likes to live in the city and that she is "so sick of the country." The decision further stated that on June 18, 1963, the appellant and her husband told the Bureau's valuation engineer and land examiner that they had not lived in the house full time since 1960 but that they frequently used it on weekends.

The appellant takes exception to many of the allegations of the report of investigation and to the conclusions of the Office of Appeals and Hearings. Particularly, she denies the allegations that she made a statement to anyone that the house was not her principal place of residence, that she and her husband stated to land office employees that they resided there only on weekends, that she attempted to sell her home to the Greers (tenants subsequent to October 1963), and that she did not make it her place of residence from October 1962 to October 1963, and she objects to the finding that she rented the house for financial gain.

Appellant has contended throughout that she has suffered from a physical disability and cannot live alone, that when her first husband died in August 1960 it was necessary for her to live with friends who could care for her, and that she rented her house on the claim primarily to protect it from vandalism.

It is readily apparent that the statements of the appellant and the findings of the Bureau are in conflict as to some of the facts pertinent to this case and that the conflicting statements can properly be resolved, if at all, only after a hearing with an opportunity for proper cross-examination. However, in spite of the apparently conflicting evidence on a number of points, a sufficient number of undisputed facts are in evidence to permit a decision without the burden of a hearing.

Section 2 of the act of October 23, 1962, 76 Stat. 1127, 30 U.S.C. § 702 (1964), defines a qualified applicant under the act as

\* \* \* a residential occupant-owner, as of \* \* \* [October 23, 1962], of valuable improvements in an unpatented mining claim which constitute for him a principal place of residence and which he and his predecessors in interest were in possession of for not less than seven years prior to July 23, 1962.

From the uncontroverted evidence in the record it may be concluded that:

(1) The appellant resided on the Gopher claim for at least 20 years prior to August 31, 1960;



(2) Substantial improvements, suitable as a permanent place of residence, were constructed upon the claim and were occupied by the appellant for that purpose for at least 20 years prior to August 31, 1960;

(3) From October 1960 until September 1962 the appellant's house was rented to various parties except during brief intervals between tenants;

(4) During the same period the appellant reserved one room of the house for the storage of her personal belongings and during the tenure of her first tenants, the Podestas, from October 1960 through May 1961, she also reserved the room to be used as she pleased and she stayed in the house on several occasions;

(5) The last tenants during the same period (October 1960 through September 1962), the Bloyeds, lived on the claim until September 19, 1962, and terminated electric service on September 25, 1962; and

(6) Electric power service was restored on October 19, 1962, in the name of appellant and was not terminated by her until October 2, 1963.

There is no evidence that appellant was not, as she claims, living on the claim on October 23, 1962.

There appears to be no question as to the appellant's meeting the requirements of the act prior to September 1, 1960. The only questions that remain to be determined are whether the improvements in question constituted a principal place of residence for the appellant on October 23, 1962, and, if so, whether the 2-year break in her occupancy nevertheless disqualified her from receiving the benefits of the act.

In answering these questions adversely to the appellant, the Bureau relied, in addition to the facts that the appellant rented the property from 1960 to 1962 and changed her voting registration from Amador County to San Joaquin County in 1962, upon evidence of events which occurred subsequent to October 23, 1962, *i.e.*, electric bills from October 1962 to October 1963, allegedly showing that the appellant did not reside on the claim full time during that period, and an allegation that the appellant offered to sell her house to a tenant in 1963.

In determining the qualifications of an applicant under the act, the Department has held that the determination must be made upon the basis of facts that existed on or before October 23, 1962. Occupancy of a mining claim after that date, or the intent to occupy it after that date, is of no consequence in determining an applicant's qualifications. *H. T. Crandell*, 72 I.D. 431 (1965); *Joseph W. Hinton et al.*, A-30374 (November 17, 1965). It follows, then, that a qualified ap-

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plicant as of October 23, 1962, does not become disqualified by virtue of his failure to continue to occupy a claim after that date. While knowledge of subsequent events may be an aid in determining prior intent, an act performed, or intent formed, subsequent to October 23, 1962, is not, itself, a proper criterion for determining qualification as of that date. Insofar, then, as the Bureau relied, in making its determination, upon evidence tending to show intent formed after that date it erred.

The Office of Appeals and Hearings stated that the law and the regulations clearly define what constitutes "a principal place of residence." I am unable to find, however, that the term has acquired a meaning as precise as the Bureau seemed to find.

The word "residence" has been construed by the courts in many connections, and, as is indicated by the reported cases, the term has been involved in many controversies, and has been the source of much confusion. It has been said that "residence" has a definite legal meaning, but *the opposite view, that the term has no exact, inflexible, or uniform meaning at law, is more frequently expressed*, and at least one court has gone so far as to say that it is axiomatic that "residence" is not a term of fixed legal meaning. \* \* \* 77 C.J.S. Residence. (Italics added.)

In one of the few instances in which the term "principal place of residence" has been judicially interpreted, the court stated that:

\* \* \* "Principal place of residence" means place of residence. A person cannot, legally speaking, have two places of residence, and the word "principal," here used, may be properly treated as surplusage. *Ross-Lewin v. Goold*, 71 N.E. 1028, 1029 (Ill. 1904); cf. *Biltmore Homes, Inc. v. Commissioner of Internal Revenue*, 288 F. 2d 336, 342 (4th Cir. 1961).

It is apparent, however, that the term "a principal place of residence," as used in the act, *supra*, does not have the same meaning as that contemplated by the court in the foregoing case, for it seems clear that the court was equating "principal place of residence" with "domicile," while there is nothing to indicate that "domicile" was contemplated in the act in question.

The act, itself, does not define "a principal place of residence." The Department's regulations, designed to supplement and implement the statute, define the term as

\* \* \* an improved site used by a qualified applicant as *one of his principal places of residence* except during periods when weather and topography may make it impracticable for use. The term does not mean a site given casual or intermittent residential use, such as for a hunting cabin or for weekend occupancy. 43 CFR 2215.0-5(d); (Italics added).

This definition is based upon language used by the Senate and House Committees on Interior and Insular Affairs<sup>3</sup> and clearly indicates that a person can have more than one "principal place of residence" within the meaning of the act. This is not a comprehensive definition. Rather, it establishes general guidelines which must be applied to all varieties of uses, some of which clearly are residential, some of which clearly are not residential, and some of which are not so clear. Moreover, it will be noted that the term is defined not so much in terms of what is included as in terms of what is excluded. Specifically, it excludes sites which are devoted to recreational and related uses, as distinguished from conventional residential use.

It seems clear from the record that the site in question was never devoted to any of the uses which are expressly proscribed by the regulation, and it is difficult to find a sound basis for the Bureau's conclusion that the appellant's occupancy of the mining claim on October 23, 1962, should be construed "as casual or intermittent." Rather, I think, the facts of the case require a finding either that the site was a principal place of residence for the appellant on that date or simply that it had ceased to be a place of residence for her before that date, for there is no evidence that the property was ever used for "casual or intermittent residential use" within the meaning suggested by the regulation, *supra*.

Supporting a conclusion that the mining claim was a principal place of residence for the appellant on October 23, 1962, are the following factors:

(1) Occupancy of the claim by the appellant for twenty years or more prior to enactment of the statute, which occupancy was interrupted only by the death of the appellant's husband and a physical disability of the appellant which made it impossible for her to live alone on the claim;

(2) The nature of the improvements built upon the claim, *i.e.*, their suitability for permanent residential occupancy;

<sup>3</sup> "The language used intends to specify that the applicant must be one who uses his claim as one of his principal places of residence. Casual or intermittent use, such as for a hunting cabin or for weekend occupancy, are not intended to be covered and the Secretary shall require applicants to submit proof of residence as a part of determining whether the applicant is qualified." S. Rep. No. 1984, 87th Cong., 2d Sess. 5-6 (1962).

"The conference committee notes that the amendment it proposes does not require the mining claim to be the principal place of residence of an applicant. It requires, rather, that it be a principal place of residence. This is intended to avoid problems in cases in which weather and topography make the site, though suitable for continuous occupancy for several months each year, impossible for the remainder of the time. It also eliminates, on the other hand, the occasional week-end user who cannot, in good faith, be said to use the site as a principal place of residence. \* \* \*)" H.R. Rep. No. 2545, 87th Cong., 2d Sess. 4 (1962).

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(3) The storage of appellant's personal property during all periods in which the site was rented and the reservation of one room of the house for that purpose and her returning to live in the house on several occasions during the first rental period, October 1960 through May 1961;

(4) The paucity of evidence that during periods of absence from the mining claim the appellant established a permanent residence elsewhere to the exclusion of the mining claim as a principal place of residence;<sup>4</sup>

(5) The apparent refusal of the appellant, prior to October 23, 1962, to consider selling the claim; and

(6) The alleged reoccupation of the premises by the appellant in September or October 1962, which was the first time she and her present husband could have occupied the claim, they having been married in July 1962 at which time the house was rented.

Supporting a contrary finding are the following factors:

(1) The appellant's departure from the mining claim in 1960 and her subsequent rental of the property to other parties;

(2) The change of appellant's voting registration in 1962 from Amador County to San Joaquin County.

As we have already noted, "a principal place of residence" is not necessarily "the principal place of residence" of an applicant, and a person may have more than one principal place of residence. Thus, the change in voting registration from one county to another does not necessarily require a finding that the first county had ceased to be "a principal place of residence" for the registrant, although it may well warrant a careful examination of the facts to determine whether such is the case. We come, then, to the final and most difficult question, whether the appellant's removal from the mining claim in 1960 produced a break in her period of occupancy that disqualified her as an applicant under the act.

It is clear, of course, that the occupancy of a mining claim which would qualify an applicant for the benefits of the act must be occupancy by the claimant and not by another in his behalf, for, while the act permits the "owner-occupant" as of October 23, 1962, to include periods

<sup>4</sup> A rental ad in the Amador Progress-News, Ione, California, of August 17, 1961, gave the appellant's address as Lee Vining, California. A rental ad of February 8, 1962, gave two telephone numbers, apparently of friends, in Ione, California. The appellant's voter registration address on April 11, 1962, was 114 W. Flora St., Stockton, California. A rental ad of March 7, 1963, gave her address as 1446 W. Mendocino Avenue, Stockton, and her voter registration of April 29, 1963, showed the same address. The pattern of moving thus established, far from negating the appellant's claim, tends to substantiate her assertion that the mining claim remained "a principal place of residence," for there is no evidence that any other address shown was more than a temporary place of abode.

of occupancy by his predecessors in interest in determining his qualifications, it does not permit him to have someone else live on the claim to establish his occupancy. See *Mrs. B. F. Rorick*, A-30399 (November 16, 1965; *Joseph W. Hinton et al.*, *supra*). It is not so clear, however, what effect is to be given a break in the period of occupancy which otherwise satisfies the requirements of the act.

The act does not, in specific terms, require that the "occupant-owner" must have actually resided on the claim during the entire 7-year period preceding July 23, 1962. In explaining the definition of "a qualified applicant" in an earlier version of section 2 the Senate Committee on Interior and Insular Affairs stated:<sup>5</sup>

Section 2 defines a qualified applicant. \* \* \* He must be a residential occupant-owner as of July 23, 1962. This does not mean in actual physical residence on that date but rather that the residence must have been habitable and, as is explained below, used during the preceding 7 years in a manner consistent with the purposes intended to be covered by the act.<sup>6</sup>

The committee substituted the term "and which constitutes for him a principal place of residence" for the term "seasonal or year-round" for the purpose of more clearly setting forth what is required to become a qualified applicant. In some circumstances climatic conditions make year-round residence impracticable. \* \* \*

\* \* \* \* \*

The applicant's use must be not only residential but also he must be the occupant-owner of improvements. The purposes of this act do not extend to renters or to squatters. In some cases there will be persons who located mining claims and constructed the residence thereunder. In other cases, the person will have purchased or inherited the claim and improvements. In a few cases there may be other residents on a claim who can produce evidence that they purchased either the improvements or the privilege of constructing improvements. It is intended to cover this type of situation if the other conditions surrounding the claim also are appropriate for relief.

The applicant must be one whose residence stems from a lawfully filed and occupied mining claim or one whose occupancy has the color of law due to a claim of title. On-the-ground evidence or other proof should disclose that at some time in the past a bona fide effort was made by the applicant or his predecessor in interest to actually conduct the type of mining enterprises intended by the mining law of 1872. S. Rep. No. 1984, *supra*, 5-6.

It will be seen, then, that while the committee specifically recognized

<sup>5</sup> The version of section 2 referred to differed from the present language of the act only in the designation of July 23, 1962, rather than October 23, 1962, the date of enactment, as the critical date for determining residential occupancy.

<sup>6</sup> The purpose of the act, as stated by the committee "is to give the Secretary of the Interior a full kit of legal tools and the discretion, when the public interest will not be injured, to permit persons who live on mining claims for residential purposes, who were in possession at least 7 years prior to July 23, 1962, where this is a principal home for them, and their claim has been invalidated or relinquished, to continue to reside in their home. The bill is a relief measure designed to aid those qualified people on whom a hardship would be visited were they to be required to move from their long-established homes." S. Rep. No. 1984, *supra*, 3.

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the problems where natural factors might make year-round residence on a mining claim impracticable and where the present claimant might not be the original locator of the claim or the one who constructed the improvements, no mention was made of the problem presented here.

As we have already noted, Congress did not rigidly define the term "a principal place of residence." It would, of course, have been impossible to anticipate every degree of residency that might be shown to exist. Presumably, Congress expected that with the guidelines set forth in the statute the Department could and should determine whether the uses of property made by a claimant were consistent with his claim that the property was a principal place of residence for him.

Without attempting to prescribe what facts would require a finding that a claimant had ceased to occupy a mining claim once used as a principal place of residence and had begun to use it for other purposes, it seems wholly consistent with the purposes of the statute to find that a temporary disruption in the period of occupancy, caused by illness or some equally cogent reason which, for practical purposes, forces the claimant to live elsewhere for a time, does not necessarily disqualify that claimant from the benefits of the act. Moreover, the fact that during such absence the claimant may have rented the property to another does not, in itself, require a finding that the claimant had ceased to use it as a principal place of residence.

It is a common practice for the owner of a house, who for one reason or another temporarily moves to another locality, to rent his house during his absence without any intention of abandoning it as his principal or permanent place of residence. Such rental is generally occasioned by sheer economic necessity rather than by a desire on the part of the owner to convert the house from his personal residence to commercial rental property. On the other hand, such an owner may move from his house and rent it with no intention of returning to live in it, in which case the house will clearly have ceased to be a place of residence for him. In still other cases, the owner's intent may be exceedingly difficult to determine. This is not to say, however, that intent alone to return to the claim can be substituted for occupancy on the critical date of October 23, 1962. The act specifies that on that date the claimant must be the "residential occupant-owner." While, as we noted earlier, the Senate Committee indicated that physical presence was in some circumstances not required on that date, the language of the act seems to negate the acceptability of occupancy at the time by someone other than the claimant. Thus, there may be no absolute standards as to what constitutes a principal place of residence for a person as of the critical date, but the facts of each case must be

scrutinized to determine whether the purposes, as well as the specific requirements, of the statute have been satisfied.

Some of the factors that are of relevance in making the determination are length of occupancy by the claimant and his predecessors in interest, *i.e.*, whether there has been, at best, occupancy for the bare minimum period required or whether the claimant made the mining claim his home for many years before the required period; suitability of the improvements constructed for permanent year-round residence; reasons for absence from the mining claim residence during the required period of occupancy, *i.e.*, voluntary or involuntary; and evidence tending either to show that the claimant intended, during the period of absence, to resume residence on the mining claim when it became possible or to show that he took up residence elsewhere during the 7-year period with no intent to return to the mining claim again on a regular residential basis.

In this case, the appellant indicates that she and her present husband resumed residence on the mining claim in September 1962. While the Bureau's investigation disclosed evidence that in March 1963 the appellant was living in Stockton, California, there is no evidence in the record that she was not residing on the mining claim on October 23, 1962, or that she did not intend at that time to continue to use the claim as a principal place of residence, and there is no evidence as to where she was then residing if not on the claim.

Viewing the evidence as a whole under the criteria set forth above, I am unable to conclude that on October 23, 1962, the mining claim in question was not a principal place of residence for the appellant. Nor do I believe that the appellant's break in her occupancy of the claim, in the circumstances described, destroyed her necessary possession of the claim for the period required. Rather, I think, a reasonable appraisal of the evidence warrants a finding that the appellant is a "qualified applicant" within the meaning of the act.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision appealed from is reversed, and the case is remanded to the Bureau of Land Management for further action consistent with this decision.

EDWARD WEINBERG,  
*Deputy Solicitor.*

## APPEAL OF RICHEY CONSTRUCTION COMPANY

IBCA-456-9-64

*Decided February 18, 1966*

Contracts: Construction and Operation: Actions of Parties—Contracts: Disputes and Remedies: Termination for Default—Contracts: Performance or Default: Excusable Delays—Contracts: Construction and Operation: Contracting Officer

Where, under a standard form of construction contract the contractor's right to proceed with the performance thereof is terminated for unsatisfactory progress and where it appears that the principal causes of the delay were the acts of the representative of the contracting officer, who willfully and arbitrarily interfered with an assumed control of the work under the contract, such causes are excusable and the contract will be deemed to have been terminated for the convenience of the Government.

### BOARD OF CONTRACT APPEALS

This appeal arises out of two earlier decisions of this Board<sup>1</sup> involving the same parties and the same issue, i.e., the question of the propriety of the action by the Government in terminating the above-described contract for default. In its first decision dated April 8, 1960, the Board held that the contract had been properly terminated for default. By inadvertence a copy of that decision was not sent to appellant or its counsel in the usual course. This was brought to light after inquiry by appellant concerning the status of the case. Reconsideration of the decision was then requested by appellant and a rehearing was granted by the Board.

The Board's decision of June 18, 1963, on reconsideration vacated its decision of April 8, 1960, and remanded the appeal to the contracting officer for appropriate action. Thereafter, on August 11, 1964, the contracting officer prepared and issued supplemental findings of fact and a decision, denying again the appellant's claims of excusable cause for delay and holding that the contracting officer in his decision of November 15, 1958, had "acted with propriety and prudence, and in the best interests of the Government, in terminating the Richey Construction Company's right to proceed under their Contract No. 14-20-0600-4215."

The principal reason for the Board's decision to vacate its decision of April 8, 1960, was the disclosure of information, not previously available to the Board or to the appellant, to the effect that the contracting officer's representative and Supervisory Highway Engineer (hereinafter referred to as the Supervisory Engineer) for the contract, had

<sup>1</sup> IBCA-187 (April 8, 1960), 67 I.D. 118, 60-1 BCA par. 2554 and IBCA-187 (June 18, 1963), 70 I.D. 222, 1963 BCA par. 3783 (Reconsideration).



received favors or gratuities from the Northwest Engineering Company. This firm was performing a contract with the Bureau of Indian Affairs, for the construction of a section of road at the end of the section being constructed by appellant, and was awarded the successor contract for completion of the portion of appellant's work that was unfinished at the time of the termination.

The Board held that the Supervisory Engineer's testimony at the first hearing was seriously discredited by reason of the circumstances. Hence, it was concluded that the previous decision in which the Board had relied heavily upon the credibility of the Supervisory Engineer could not stand. Because the lack of credibility alone was considered sufficient cause to vacate the Board's decision of April 8, 1960, the Board did not review, in its decision of June 18, 1963, the remainder of the significant new evidence received at the re-hearing. We shall now proceed to do so.

At the re-hearing in November 1962, the testimony of Mr. John T. Roberts,<sup>2</sup> a former Government inspector for the Bureau on this contract, showed that the Supervisory Engineer had exercised an excessive degree of control and direction over the operations of the appellant with respect to placing of dirt, watering and rolling the embankment for the road. Contradicting the testimony of the Supervisory Engineer at the first hearing, Mr. Roberts testified at the re-hearing that while the contractor's equipment was not all in good condition it was adequate to permit the appellant to perform the construction work under the contract. The Supervisory Engineer had testified at the first hearing that the reason he had restricted the appellant's operations to less than a length of roadway that would permit efficient and economical operation of appellant's equipment, was the poor condition of such equipment.

The question of whether Richey had sufficient ability and adequate equipment to perform the contract gives rise to the following corollary proposition: In order to award the contract to Richey, the Government necessarily determined that Richey was the lowest responsive and responsible bidder. Hence, prior to award, the Government should have had a great deal of information as to Richey's equipment and ability to perform the contract.

Moreover, Mr. Roberts corroborated the testimony of appellant's other witnesses to the effect that the Supervisory Engineer had ordered excessive watering of the dirt in embankment during the early stages of the work. One of the partners of appellant testified that

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<sup>2</sup> Mr. Roberts did not testify at the first hearing. His daily reports were received in evidence, but, according to the Supervisory Engineer, the data contained in those reports were furnished to Roberts by the Supervisory Engineer and hence, in the main did not reflect Roberts' independent observations.

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the Supervisory Engineer had directed the application of water in unnecessarily large amounts. The excessive quantities of water, according to appellant, created mud about 10 inches in depth and slippery conditions elsewhere. This hampered the operation of trucks and other rubber-tired equipment hauling dirt and water, so that tractors were sometimes necessary to push the loaded trucks through the mud. Some portion of the excess water undoubtedly came from leaky valves on appellant's water trucks.

In connection with appellant's claims that it is entitled to an extension of time because of newly discovered evidence of overruns, Mr. Roberts also testified concerning the amount of alleged overrun of excavation and borrow material used in constructing the grade between Station 3135+00 to Station 3395+00. It was Mr. Roberts' recollection that the quantities of earth used were about 100 percent in excess of the contract estimates. He was unable, however, to state the quantities used in terms of cubic yards and did not have any data to support his testimony. It appears from the contract that the total estimated quantity of excavation was 124,619 cubic yards and borrow was estimated at 49,469 cubic yards. The contract does not provide estimated quantities separately for the area described above. As of November 13, 1958, the total actual quantities were respectively 70,604 cubic yards and 49,890 cubic yards (excluding 15,118 cubic yards of "unauthorized" excavation or borrow and 19,950 "unauthorized" embankment). The relatively small overrun of borrow material is not sufficient, by itself, to justify an extension of time.

Even when the "unauthorized" quantities are added, the total actual quantity of earth material, 155,562 cubic yards, falls short of the total contract estimate of 174,088 cubic yards. Except for some rough grading, the embankment was practically completed by Richey at the time of termination, according to Mr. Roberts. We conclude that appellant is not entitled to the extension of time it has claimed because of overruns.

Mr. Roberts testified further that on many occasions he heard the Supervisory Engineer make statements in substance that he was going to "break" the contractor, that he couldn't get along with him.

Mr. Henry Rudder, Jr., was a grade foreman in the contractor's employ at the time of contract performance, and worked for Northwest after the termination of the Richey contract. He had been employed by the Department of the Interior for 21 years previously. He testified that there was a significant difference between the lenient attitude of the Supervisory Engineer toward Northwest concerning the requirements of its contract for completion of the Richey job and the strict supervision and limitations that had been imposed upon the

Richey firm. This comparison was made as to the excessive watering directed by the Supervisory Engineer as well as his control over other operations on the Richey job and the absence of any direction or control by the Supervisory Engineer over the operations of Northwest. The differences were illustrated by the relatively dry fills constructed by Northwest, the unlimited independence of action accorded to Northwest with respect to the length of span of roadway that could be worked upon and the limitation of about 300 feet permitted to Richey. In directing the operations of watering and placing dirt, the Supervisory Engineer took over the supervision of that work from Mr. Rudder.

The limitations of space imposed on Richey by the Supervisory Engineer were unusual and had never before been imposed by him with respect to any other job. In Mr. Rudder's opinion, such restrictions had the effect of curtailing the progress of the work by about 60 percent, due principally to the fact that almost throughout the job a substantial amount of Richey's equipment was forced to remain idle for lack of sufficient room in which to operate.<sup>3</sup>

Mr. Rudder testified further that although the Supervisory Engineer had expressed an opinion that Richey did not have sufficient experience and equipment to do the job, it was his (Rudder's) opinion that this appraisal was incorrect; that Richey would have been able to finish the job if given a "reasonable chance" and that Richey's watering equipment "was as good as a number of other contractors that have finished jobs there."

Mr. Hugh Richey, one of the owners of the Richey Construction Company, testified at the re-hearing with respect to the personal animosity displayed by the Supervisory Engineer and his assumption of control near the start of the job. On the first day of grading operations Mr. Rudder pointed out to Mr. Richey a Government stake marked "cut 1 foot" at the edge of the road. This stake was in a fill area and was obviously in error. When the Supervisory Engineer was called over to look at the stake he said in substance that the stake indicated a cut and that the material would have to be excavated in accordance with the instructions on the stake. Mr. Richey replied in effect that if ordered to take out the material he would do so but that he would not put it back. Mr. Richey conceded that he had spoken in an abrupt manner and perhaps offended the Supervisory Engineer. It developed that the stake was in error and that the Government should have removed it earlier but had neglected to do so. This incident, according to Mr. Richey, marked the beginning of a period of strained relations that lasted throughout the performance of the contract.

<sup>3</sup> Cf. *Lincoln Construction Company*, IBCA-438-5-64 (November 26, 1965), 72 I.D. 492, 65-2 BCA par. 5234.

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About a day after the stake episode Mr. Richey found the Supervisory Engineer directing traffic on the job, motioning the various pieces of equipment such as water trucks, earth material, rollers and blades, to come and go. Mr. Richey said he protested to the Supervisory Engineer that the equipment was too congested for the space and that it was creating watery mud 10 inches deep, causing trucks and "pulls" loaded with dirt to bog down so that they required pushing by tractors to get out. Thereafter, similar conditions prevailed for some time with respect to limitations of space although the excessive watering apparently did not extend beyond the first 2 months, because adequate water was supplied by rain during the latter part of the job. The Supervisory Engineer's testimony at the first hearing indicated that water usage during May and June 1958, was 62 gallons and 42 gallons, respectively, per cubic yard of fill, whereas the standard is 30 gallons per cubic yard.

Mr. Richey testified that he continued to make frequent protests concerning the manner in which the Supervisory Engineer was interfering with and controlling the operations, and limiting the space within which Richey could operate.<sup>4</sup> In a letter dated July 22, 1958 (Exhibit 46), Mr. Richey called the situation to the attention of the contracting officer and requested an extension of 45 days, which was not granted.

Mr. Richey admitted that on one occasion he attempted to give the Supervisory Engineer a gratuity for his overtime work, at the suggestion of a representative of the bonding company. This was done in an effort to discover whether the Supervisory Engineer's arbitrary and hostile attitude was due to Richey's failure up to that time to suggest a donation. The Supervisory Engineer refused to accept the proffered gratuity.

While it is no more to be condoned than was the acceptance of gratuities from Northwest by the Supervisory Engineer, Mr. Richey's rejected offer could have no effect on performance of the contract. On the other hand, numerous decisions of the courts have held that the conduct of Government representatives, because of their extensive powers and authority, must be above suspicion and free from bias and arbitrary or capricious acts.<sup>5</sup> This is true of conflicts of interest even where there is no direct connection between the perhaps innocent ac-

<sup>4</sup> *Peter Kiewit Sons Co., Inc. v. United States*, 138 Ct. Cl. 668, 674 (1957): " \* \* there is in every Government contract as in all contracts, an implied obligation on the part of the Government not to willfully or negligently interfere with the contractor in the performance of his contract."

<sup>5</sup> *E.g., United States v. Bianchi & Co.*, 373 U.S. 709, 713 (1963); *Ripley v. United States*, 223 U.S. 695, 702 (1912); *Kihlberg v. United States*, 97 U.S. 398 (1878).

ceptance of a gratuity and the administration of the contract in question.<sup>6</sup> Moreover, the testimony of Mr. Richey is supported by Mr. Roberts, the former Government inspector on the job (employed by a different Government agency at the time of the re-hearing), and by Mr. Rudder, who was no longer employed by Richey after termination of the contract.

The Supervisory Engineer testified at the re-hearing concerning the gratuities accepted by him at the hands of Northwest Engineering Company and as to the offer of a gratuity by Mr. Richey. He did not, however, deny any of the charges made by Mr. Richey, Mr. Roberts and Mr. Rudder in their testimony with respect to his statements that he was going to "break" the contractor, or his arbitrary actions in taking over the direction and control of the work and hampering the progress of the performance of the contract. No further evidence was introduced by the Government at the re-hearing.

Despite the Government's finding that the contract work was only 53 percent complete when 90 percent of the contract time had expired, the last monthly report, for October 1958 (Exhibit 206) shows the estimated completion date to be January 21, 1959. The major items of work not completed were those having a comparatively high dollar value, such as Gravel Base and Asphalt MC-1, 2, 3. The estimated value of the Gravel Base was \$44,099.50, of which \$9,635.14 had been completed. The estimated value of the Asphalt item was \$62,400, none of which had been completed. Hence, these two items represent nearly \$100,000 of the total estimated value of \$174,087.62 of uncompleted work on November 1, 1958. It is apparent that the percentage of completion (53 percent) and the remaining time estimated to be required for complete performance (2 months, 21 days) are inconsistent because of the use of dollar values in computing the percentage for items that require disproportionately short times for completion.

If the estimated time required for completion, 82 days, can be relied upon as being reasonable, then its percentage of the 210 days time allowed by the contract would be about 38.5 percent. The contract work should then be about 61 percent complete rather than 53 percent. The required completion date was November 21, 1958, hence, according to the report for October 1958, the contractor was estimated to be 2 months behind schedule on November 1.

The biased attitude of the Supervisory Engineer, as expressed in his repeated assertions that he was going to "break the contractor," must be given great weight by the Board in arriving at its decision. The Board is convinced that this attitude resulted in the Supervisory Engineer's interference with the performance of the work, his insist-

<sup>6</sup> See authorities cited in *Richey Construction Company*, IBCA-187 (June 18, 1963), 70 I.D. 222, 1963 BCA par. 3783 (Reconsideration).

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ence upon excessive use of water in the early stages of performance, his unique limitation on length of working span (all with concomitant substantial delays and increased costs), culminating in the financial distress which did in fact "break" the contractor. The resulting delays, in our opinion, were the principal causes of the contractor's eventual failure to meet its financial obligations, including wages, insurance premiums, etc., that forms the basis for the termination of the contractor's right to proceed. The notice of termination was issued prior to the date required for completion of the contract because it was apparent to the contracting officer that the contractor could not complete the contract unless it received sufficient financial assistance.

After extensive consideration and deep concern for the respective rights of the parties and with due regard for the Supplemental Findings of the contracting officer, dated August 11, 1964, the Board concludes that the actions of the Supervisory Engineer in controlling and directing the contractor's operations over the contractor's protests, and slowing down substantially the progress of the work, overstepped the line between necessary and proper contract administration and arbitrary interference, amounting to at least a partial assumption of responsibility for contract performance.<sup>7</sup>

The clause of the contract entitled Termination for Default—Damages for Delay—Time Extensions provides in paragraph (c) as follows:

(c) The right of the Contractor to proceed shall not be terminated, as provided in paragraph (a) hereof, nor the Contractor charged with liquidated or actual damages, as provided in paragraph (b) hereof because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including, but not restricted to, acts of God, or of the public enemy, *acts of the Government, in either its sovereign or contractual capacity* \* \* \*. (Italics supplied.)

The Board finds that the Supervisory Engineer as the contracting officer's representative for administration of the contract,

(1) improperly interfered with and assumed direction and control over the performance of the contract with Richey Construction Company,

(2) that such actions were the acts of the Government and were the cause of approximately two months' delay in the performance of the contract,

(3) that such delay was due to unforeseeable causes beyond the control and without the fault or negligence of the contractor,

(4) that the contractor was not in default of performance on November 15, 1958,

(5) that the right of the contractor to proceed with the work under

<sup>7</sup> Cf. *Dale Construction Company v. United States*, Ct. Cl. No. 134-57 (December 11, 1964).

the contract was prematurely and improperly terminated by the Government in its notice to the contractor dated November 15, 1958.

### *Conclusion*

The appeal is sustained. The contract is considered to have been terminated for the convenience of the Government. In the absence of a clause providing that the contract may be terminated for the convenience of the Government, settlement of the contractor's claims should be in the nature of an equitable adjustment.<sup>8</sup> The appeal file is remanded to the contracting officer for appropriate action, including an accounting and settlement in accordance herewith and the payment of amounts retained, such as liquidated damages.

THOMAS M. DURSTON, *Deputy Chairman.*

I CONCUR:

I CONCUR:

DEAN F. RATZMAN, *Chairman.*

WILLIAM F. MCGRAW, *Member.*

HAROLD N. ALDRICH

A-30469

*Decided February 28, 1966*

#### **Alaska: Homesteads**

When land within a homestead settlement claim is subsequent to the initiation of the claim reserved by a classification order issued pursuant to the Recreation and Public Purposes Act, and the claim is then relinquished, and on the same day a new settlement claim on the land is filed, the new claim can initiate no rights since the reservation of the land pursuant to the classification makes it unavailable for further appropriation.

#### **Rules of Practice: Appeals: Dismissal—Rules of Practice: Appeals: Standing to Appeal**

When an appeal to the Director is dismissed for failure to file a timely statement of reasons, and that decision is not appealed, the party has no standing to revivify subsequently in an appeal on another matter to the Secretary the substantive issue involved in the other case and the decisions below are final.

#### **Alaska: Homesteads—Homesteads (Ordinary): Second Entry—Homesteads (Ordinary): Settlements**

A homestead settler who files a relinquishment of his location notice of settlement can make a second entry only if he is eligible to do so under the statute regulating second entries.

<sup>8</sup> *Foster Wheeler Corporation, IBCA-61* (January 26, 1960), 67 I.D. 22, 60-1 BCA par. 2481. *Cf. Cannon Construction Co., Inc. v. United States*, 162 Ct. Cl. 94 (1963); Comp. Gen. Dec. B-155936 (February 5, 1965); 15 Comp. Gen. Dec. 439.

*February 28, 1966***Alaska: Homesteads—Homesteads (Ordinary): Second Entry—Homesteads (Ordinary): Settlements**

A homestead settler who relinquishes his first location notice of settlement and is otherwise eligible to make a second entry can establish no rights under his second settlement until he files his relinquishment if he has maintained his rights under his first settlement up to the moment of relinquishment.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Harold N. Aldrich has appealed to the Secretary of the Interior from a decision of the Office of Appeals and Hearings, Bureau of Land Management, dated March 25, 1965, which affirmed a decision of the Anchorage, Alaska, land office, dated January 27, 1965, rejecting his homestead application, Anchorage 059754, because the lands applied for<sup>1</sup> had been segregated from all forms of appropriation prior to the filing of his homestead application, and were therefore not available for acquisition at that time.

The records show that on May 18, 1959, Aldrich filed a notice of location of settlement or occupancy claim on 160 acres of unsurveyed lands,<sup>2</sup> pursuant to the act of April 29, 1950, 64 Stat. 94, 48 U.S.C. §§ 371-371c, 461a (1958). In the location notice, identified as Anchorage 048913, Aldrich stated that his settlement or occupancy began May 15, 1959. On April 16, 1963, he filed a request for leave of absence for one year, covering the fourth year of his settlement claim, i.e., May 15, 1962, to May 14, 1963. The request was denied by a decision of the Anchorage land office dated July 29, 1963.

Subsequently, Aldrich filed a relinquishment of his settlement claim on August 13, 1963, and, on the same day, filed a new notice of location of settlement or occupancy claim describing the same lands that were included in his previous location notice and stating that his occupancy began May 15, 1959. The new location notice is identified as Anchorage 059754.<sup>3</sup>

Pursuant to a request of the land office, Aldrich, on November 14, 1963, filed a corrected notice of location describing the lands involved by metes and bounds as they were still unsurveyed at that time.

In a notice received by him on April 29, 1964, Aldrich was informed that the plat of survey covering the lands in his location had been officially filed on March 2, 1964, that he should adjust his claim to the

<sup>1</sup> The lands are the N $\frac{1}{2}$ NE $\frac{1}{4}$ , NE $\frac{1}{4}$ NW $\frac{1}{4}$  sec. 8, and the NW $\frac{1}{4}$ NW $\frac{1}{4}$  sec. 9, T. 11 N., R. 2 W., S.M., Alaska.

<sup>2</sup> The location notice described the lands by legal subdivisions although they were unsurveyed at that time.

<sup>3</sup> The notice described the land claimed incorrectly as the "NE $\frac{1}{4}$ , NW $\frac{1}{4}$ , N $\frac{1}{2}$ , NE $\frac{1}{4}$ , sect. 8 NW $\frac{1}{4}$ , NW $\frac{1}{4}$  sect. 9." On November 4, 1963, Aldrich filed a "corrected description" describing the land as "NE $\frac{1}{4}$ NW $\frac{1}{4}$ :N $\frac{1}{2}$ NE $\frac{1}{4}$ , sect. 8 NW $\frac{1}{4}$ NW $\frac{1}{4}$ , sect. 9. Total 160 acres section 8 and 9."



survey and that to protect his preference right to enter the lands he should file an application for a homestead entry within 3 months of that date.

When Aldrich failed to make the adjustment, the land office did it for him and notified him of its action on July 1, 1964, as required by the pertinent regulation, 43 CFR 2211.0-8(b).

On September 2, 1964, the land office again reminded Aldrich of the desirability of making entry and sent him an application to enter.

By letter of September 23, 1964, the land office informed Aldrich that since his notice of location, filed November 4, 1963, had not been filed within 90 days from May 15, 1959, the date he set out in it as the date of settlement, or occupancy of the lands, no credit could be given for residence and cultivation prior to November 4, 1963, as provided in 43 CFR 2211.9-1(c)(4). The letter also informed him that a review of the status records revealed that on August 12, 1963, the lands involved were reserved by Amendment No. 1 to Classification Order No. 160, issued pursuant to the Recreation and Public Purposes Act, 44 Stat. 741 (1926), as amended, 43 U.S.C. 869 (1964), and were thus segregated from all forms of appropriation; therefore, the lands were not available for settlement pursuant to a claim with priority after August 12, 1963. For this reason, the letter concluded, his notice of location was found to be unacceptable for recordation and had been removed from the records.

Aldrich, apparently, made no response to this letter but on December 28, 1964, he filed application for homestead entry on the same lands described in his previous location notices. This application was rejected by the land office decision of January 27, 1965, from which Aldrich has appealed to the Director and now to the Secretary. The application was rejected for the same reason as was his second notice of location.

The appellant has filed a lengthy statement of reasons, in which he discusses the whole history of his settlement and life in Alaska and the hardships and inequities that he has assertedly endured.<sup>4</sup> As far as the homestead aspects of this case are concerned, the appellant's discussion of the history of his settlement and life in Alaska, although informative, is almost completely irrelevant to the matter at issue. The only relevant matter that the appellant discusses is a repetition of his statement made below that he did not have the money to complete

<sup>4</sup> As part of it he relates his attempts to acquire a trade manufacturing site, involving the other land, against which the Government brought a successful contest. Aldrich's appeals was dismissed by the Office of Appeals and Hearings, Bureau of Land Management, September 24, 1964, for failure by the appellant to file a statement of reasons in support of his notice of appeal filed April 27, 1964, the time for filing the statement having expired (43 CFR 1842.5-1). The appeal to the Office of Appeals and Hearings have been correctly dismissed on the grounds stated and no appeal ever having timely been made from that dismissal, the decisions below are final as to the trade and manufacturing site.

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the required plowing and planting of 20 acres of his claim because claim jumpers destroyed his lodge (on other land), wiping out his savings, and that he discussed this matter with land office personnel in 1963; that they suggested he relinquish the claim and refile, both of which he did on August 13, 1963, or, as it happened, one day after the lands were classified for recreational purposes.

While this appeal arises from the rejection of Aldrich's application for a homestead entry, it is not clear whether Aldrich regarded his application as an attempt to convert his settlement claim into an entry or as a new and independent action. If it is the latter, then it came long after the land had been withdrawn from entry by the Classification Order of August 12, 1963, and was properly rejected. *Joseph A. Pittman*, A-30347 (January 25, 1965). If, however, it is the former, then our conclusion remains the same, but for somewhat different reasons. The issue then to be decided would be whether the lands sought by the appellant were available for settlement on the date he filed his second notice of location on August 13, 1963.

Regulation 43 CFR 1825.1(a) provides:

Upon the filing in the proper land office of the relinquishment of a homestead claim, the land, *if otherwise available*, will at once become subject to further application or other appropriation in accordance with the applicable public land laws. A provision to this effect is contained in section 1 of the act of May 14, 1880 (21 Stat. 140; 43 U.S.C. 202). (*Italics added.*)

The relinquishment by the appellant of his first notice of location of settlement or occupancy claim, Anchorage 048913, became effective immediately upon the date his relinquishment was filed, namely August 13, 1963. *Frederick J. Zillig v. Vernon M. Milburn*, 67 I.D. 136 (1960).

The question, then, is whether the classification notice cut off any interest that Aldrich might have in the land covered by his notice. The decisions below held that his rights under his first notice continued up to the moment he filed his relinquishment and that his rights under the second notice arose at the moment he filed it. The classification notice, they held, having been filed before the relinquishment, became effective immediately on its filing and segregated the land from any later claims.

These decisions assumed, and rightly so as is discussed more fully below, that a classification notice can be filed for land which at the time of filing is subject to prior rights that the classification notice cannot affect, but that it will begin to operate upon the termination of the prior rights.

Does, however, Aldrich have any rights in his claim which predated the filing of the classification notice? The most obvious of such possible rights are, of course, those which his first acts of settlement and

notice of settlement established. These if followed by the requisite residence and cultivation would have kept the classification notice at bay.

When Aldrich filed a relinquishment of his first settlement, he removed that as a possible protection to his rights. Having given up whatever rights he had gained by his first notice he could no longer rely upon it to exclude others from establishing competing claims to the land.

Thus, whatever rights he asserts thereafter, either on the basis of his second notice of settlement or of his later application for homestead entry, if these be different, must exist independently of his rights under his first notice. Since Aldrich claims that he has rights in the land predating the classification notice, we must examine his right to make a second settlement or homestead entry, and, if he may, determine the date on which he could first establish any new rights in the land.

The regulation in effect now and when Aldrich filed his first notice plainly states that if an applicant for a homestead entry has filed a location notice of settlement and failed to perfect title he must, in connection with another application to make homestead entry, demonstrate his eligibility for a second entry under the act of September 5, 1914, 38 Stat. 712, 43 U.S.C. 182 (1964). 43 CFR 2211.9-4(b), formerly 43 CFR, 1954 rev., 65.12.

A settler who attempts to establish a second settlement must be eligible to make a second entry or he gains no rights by his second settlement. *Heiskell v. McDowell*, 23 L.D. 63 (1896).

As has been said:

\* \* \* one who, at the time he performed an act of settlement relied upon to sustain his prior right of entry, was disqualified as an entryman by having an entry, not actually and wholly abandoned, then of record, was equally disqualified to make a valid settlement and gained nothing thereby as against the valid adverse right of another, asserted prior to the removal of such disqualification. *Short v. Bowman*, 35 L.D. 70, 76 (1905).<sup>5</sup>

While in several cases the Department has recognized rights founded upon a second settlement before the settler's eligibility for a second entry was established (*Heiskell v. McDowell*, *supra*; *Hall v. Mitchell*, 24 L.D. 584 (1897)), these have been instances in which the fact that the claimant had abandoned his first entry was unquestioned or in which it was evident that he was clearly entitled to have his entry of record canceled or other disqualifications, merely technical, removed. *Short v. Bowman*, *supra*, 73; *William H. Archer*, 41 L.D. 336 (1912); *Aroni v. Vance*, 48 L.D. 543 (1922).

<sup>5</sup> Cf. *United States v. John C. Brown*, 57 I.D. 169 (1940), motion for rehearing, *id.* 173, 176-177.

February 28, 1966

Whether or not an abandoned first entry must be canceled of record before settlement for a second claim can be made, the fact is that here Aldrich has never admitted that he abandoned his first claim or indeed that it was in any way invalid. He asserts that he maintained his interest in the claim at all times and only relinquished it because he had not been able to cultivate the requisite 20 acres in the fourth entry year.

Accordingly, we conclude that Aldrich could not make a second settlement until he had filed a relinquishment of his first notice of settlement. Furthermore, his second settlement would give him an interest in the land only if he could show to the satisfaction of the Secretary (or his delegate), among other things, that the prior entry was lost, forfeited, or abandoned because of matters beyond his control. 43 CFR 2211.5-1 (a) through (d).

Since his second claim could arise no sooner than the relinquishment of his first, precisely the moment that the classification order impinged upon the land, at best Aldrich's second claim could only be simultaneous with the classification notice. Yet the classification notice was in existence prior to Aldrich's attempted second filing and covered the land subject only to Aldrich's first settlement. Upon the termination of the first settlement, the classification order took effect *eo instante* and, so long as it exists, it takes precedence over any rights junior to it.

Here Aldrich attempts to tie his second settlement to May 15, 1959, the date of his first. To do so is self-defeating. If that date is held to be controlling, it being more than 90 days before Aldrich filed his second notice of settlement on August 13, 1963, he would then lose all credit for residence (and cultivation) completed before August 13, 1963. Act of April 29, 1950, *supra*. Since the late filing of a notice of settlement does not extend the 5-year period within which a settler must demonstrate compliance with the requirements of the homestead law, Aldrich would have had left only to May 18, 1964, to complete his obligations. The recording act does not purport to extend the life of a homestead settlement claim or to waive the regular obligations. A settler who files late loses credit for his residence and cultivation but is not excused from doing the requisite cultivation and residence. That is, if he files in the third year after settlement, he can get no credit for the second year's cultivation, yet he cannot obtain a patent without having performed it. It would seem, therefore, that any settler who postpones the filing of his notice for a considerable time may find that he not only has lost credit for prior cultivation and residence but that he has also made it impossible for him to satisfy the requirements of the homestead law. So here Aldrich, having let the fourth entry year, ending on May 18, 1963, lapse without filing a notice of settlement,

could not possibly prove cultivation in the fourth year. Thus his second settlement, if otherwise valid, would properly be subject to cancellation for this reason alone.

Furthermore, as we have seen, Aldrich could not establish any claim to the land in conflict until he had relinquished his first entry. He would then have to settle on the land again and prove his eligibility for a second entry. Even if his second settlement would be deemed to be simultaneous with his relinquishment, it could not take precedence over the classification notice, indeed must yield to it. The classification notice overcomes the claim of the settler. Cf. *Orin D. Pool*, 44 L.D. 137 (1915); *Walter R. Freitag*, 52 L.D. 199 (1927); *James C. Forsling*, 56 I.D. 281 (1938).<sup>6</sup>

Therefore the land at issue was not open to settlement or entry after the filing of the relinquishment and Aldrich's application for homestead entry was properly rejected.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A (4) (a); 24 F.R. 1348), the decision of the Office of Appeals and Hearings, Bureau of Land Management, is affirmed.

ERNEST F. HOM,  
*Assistant Solicitor.*

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<sup>6</sup> In the *Pool* case, land in section 2, a school section, which was in a national forest on the date of the New Mexico enabling act was later restored to the public domain. After the date of the act and prior to restoration of the land, Pool made a settlement, followed by the allowance of his application for a homestead entry. The Department held that the inchoate claim of the State prevented the initiation of a settlement or homestead claim initiated after the date of the act and that the act, granting the school sections to the State operated to reserve and withdraw section 2 upon its restoration to the public domain. It concluded that the rights of the State were paramount to those of the homesteader.

In *Freitag*, it was held that one who relinquishes a homestead entry then covered by an application for an oil and gas prospecting permit which was thus subject to the entry in certain aspects and then applies for a second entry for the same land has merely the status of a homestead applicant for land covered by a prior permit application notwithstanding that the relinquishment and the second entry application were filed simultaneously. In other words, the pending prospecting permit application inserted itself between the first and second homestead claims despite the theoretical absence of a time gap between them.

In *Forsling*, it was held that a relinquishment becomes effective immediately on filing, restores the land to the reservoir of vacant, unappropriated public land without further action.

"But as a result of its reversion to the public domain the land immediately becomes subject to and affected by such relevant lawful burdens, claims, or rights arising during the life of the entry as the life of the entry may have prevented from attaching and a change in its status thus occurring may operate to restrict, render contingent or wholly bar the right sought in an application made subsequently to the filing of a relinquishment or even simultaneously therewith." (P. 286.)

## GLANVILLE MINERALS CORPORATION

A-30484

Decided March 8, 1966

Oil and Gas Leases: Assignments or Transfers—Oil and Gas Leases:  
Royalties

Where the assignee is a corporation, the requirements of the regulation, 43 CFR 3128.6, pertaining to filing of an assignment of royalty interests in an oil and gas lease apply only to corporations and not to its stockholders.

## APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Glanville Minerals Corporation has appealed to the Secretary of the Interior from a decision of the Office of Appeals and Hearings, Bureau of Land Management, dated April 22, 1965, which vacated in part and affirmed in part as modified, a Billings, Montana, land office decision dated January 30, 1964. Glanville Minerals Corporation is the assignee of production payment interests in oil and gas leases Great Falls 052020(a), 052020(b), Montana 033650, BLM (SD) 026262 and BLM (SD) 026266. The land office decision stated that approval of the assignment of production payment interests filed for record purposes only was denied because proper qualifications had not been shown and required those individuals who constitute the partnership of Lehman Brothers, which is the 100 percent owner of Glanville Minerals Corporation, to submit within 30 days separate statements setting forth their exact percentage of participation, age, citizenship, addresses, interests and holdings. The Office of Appeals and Hearings held that denying approval of the assignment was improper since the relevant departmental regulation, 43 CFR 3128.6, notes that,

\* \* \* In order that the holdings of the assignee may be verified, all assignments of royalty interests *should be filed for record purposes* within 90 days from the date of execution, *but no formal approval will be given.* \* \* \* (Italics supplied.)

No appeal is taken from this aspect of the Bureau's decision and further consideration is not necessary in view of our disposition of this case, as indicated *infra*.

The Bureau also held that departmental regulation 43 CFR 192.42(f), now 43 CFR 3123.2(g), permits the appellant corporation through an authorized corporate officer, when filing an assignment of a production payment interest, to "reference" its qualification to prior filed qualification material and to indicate whether any changes have occurred since the previous qualification filing. The record shows that on October 25, 1963, Frank B. McShane, Vice President of Glanville Minerals Corporation, executed a "Statement of Qualifications and Holdings of Assignee of Production Payment Interest" which was filed in the Billings land office together with a "Conveyance of Production Payment" from the Texas Pacific Coal and Oil Company

to the Glanville Minerals Corporation. The Glanville Minerals Corporation declared that the attached conveyance was filed for record purposes, pursuant to departmental regulation 43 CFR 192.145, now 43 CFR 3128.6. It provided statements as to citizenship, interests held and overriding royalties and also declared that

3. The undersigned has previously qualified to hold interests in leases issued under the Mineral Leasing Act of February 25, 1920 as amended and the Mineral Leasing Act for Acquired Lands of August 7, 1947, which qualifications are on file under General Qualifications File, B.L.M.-066100. There have been no changes to such qualifications.

Checking the contents of the qualification file, the land office discovered that it disclosed that Lehman Brothers, a general partnership, owns 100 percent of the stock of Glanville Minerals Corporation, and that Robert Lehman is the only person to own a 10 percent or more interest in the partnership.<sup>1</sup> It was later also discovered that Robert Lehman's personal statement as to his qualifications, dated September 25, 1963, was contained in the qualification file.

The Bureau held that the appellant was permitted under 43 CFR 3123.2(g), *supra*, to show its qualifications by reference to its showing on the prior filing, but that it would have to file another statement as to the personal qualifications and holdings of Robert Lehman over his signature, because, although the corporate officer of Glanville Minerals Corporation may act for the corporation and state that there has been no change in the prior filed showing of qualifications of the corporation, such officer may not state for Robert Lehman whether there has been any change in his prior filed showing of personal qualifications.

The appellant appeals from this decision, not, it states, because Robert Lehman cannot qualify, but "to obtain relief from the effect the decision will have on the oil and gas industry as a whole \* \* \*." For this reason, the Humble Oil & Refining Company has filed an amicus curiae brief.

These briefs singly or jointly make the contentions, *inter alia*, that the assignment of production payment interests was filed for record purposes only, pursuant to 43 CFR 192.145, now 43 CFR 3128.6, as stated in the filing, that there is no provision in this regulation requiring any information to be furnished by a stockholder of a corporate assignee, the sole requirement dealing with statements by the "assignee," here the Glanville Minerals Corporation, that if the regulation is defective in this respect, it should be amended but appellant cannot be held not to have complied with a regulation which is unclear, that the

<sup>1</sup> Regulation 43 CFR 3123.2(g) requires, in part, that "\* \* \* A separate statement from each stockholder owning or controlling more than 10 percent of the stock of the corporation setting forth his citizenship and holdings must also be furnished. \* \* \*," in connection with the filing of an oil and gas lease offer by a corporation. The full regulation is set forth, *infra*.

March 8, 1966

provisions of 43 CFR 192.42(f), now 43 CFR 3123.2(g), relating to the filing of oil and gas lease offers, do not apply to assignments of royalties or payments out of production and should not have been applied here, and that the appellant has fully complied with the provisions as to its filing under 43 CFR 192.145, now 43 CFR 3128.6.

The appellant also inquires why the filing fee for its present appeal should be \$25 rather than \$5, because, although five leases are involved it is filing a single protest. As far as this last point is concerned, 43 CFR 1844.2(b) requires that "a filing fee of \$5 must be paid for each separate \* \* \* lease, protest, or similar filing or interest on which the appellant is seeking favorable action." Although appellant has filed only one protest he seeks favorable action with respect to five leases and so must pay a fee for each.

Appellant's other contentions, however, are meritorious.

Regulation 43 CFR 3128.6 provides

Royalty interests in oil and gas leases constitute holdings or control of lands and deposits within the meaning of section 27 of the act. In order that the holdings of the assignee may be verified, all assignments of royalty interests should be filed for record purposes within 90 days from the date of execution, but no formal approval will be given. Any such assignment will be deemed to be valid provided it is accompanied by a statement over the assignee's signature that he is a citizen of the United States and that his interests in oil and gas leases do not exceed the acreage limitation as provided in § 3120.1-2 and by the statement as to overriding royalties required by § 3125.4. If any portion of this statement is found to be false the assignment shall be invalid.

Appellant would appear to have met its terms since statements regarding citizenship, acreage limitations and overriding royalties have been provided. The regulation as it is currently worded does not require any filing of statements by a stockholder.

Regulation 43 CFR 3123.2(g), referring to the filing of offers for noncompetitive leases, provides

If the offeror is a corporation, the offer must be accompanied by a statement showing (1) the State in which it is incorporated, (2) that it is authorized to hold oil and gas leases and that the officer executing the lease is authorized to act on behalf of the corporation in such matters, (3) the percentage of voting stock and of all the stock owned by aliens or those having addresses outside of the United States, and (4) the names and addresses of the stockholders holding more than 10 percent of the stock of the corporation. Where the stock owned by aliens is over 10 percent, additional information may be required by the Bureau before the lease is issued or production is obtained. A separate statement from each stockholder owning or controlling more than 10 percent of the stock of the corporation setting forth his citizenship and holdings must also be furnished. Where such material has previously been filed a reference by serial number to the record in which it has been filed, together with a statement as to any amendments will be accepted.



This regulation does specifically require separate statements from stockholders owning more than 10 percent of the stock, although it is not absolutely clear that it requires a requalification of stockholders when a corporation files a reference qualification. But this question need not be decided, for it is certainly not apparent from the regulations that when one files an assignment of a production payment interest for record purposes under 43 CFR 3128.6, 43 CFR 3123.2(g) thereby is brought into operation. Nowhere in the regulations is this clearly expressed. It may well be that this was meant to be the case, but if so the regulations will have to be revised to be more explicit. *Cf. M. Finell et al.*, 67 I.D. 393 (1960).

The appellant apparently did initially believe that 43 CFR 3123.2(g) pertained here since it did refer to its prior qualifications being on record. However, this should not affect the outcome of this case in view of the finding that the regulation does not clearly apply and in view of the fact that the appellant did, in connection with the present assignment, furnish the statements as to citizenship, interests held and overriding royalties required by 43 CFR 3128.6.

Regulation 43 CFR 3128.2(a)(1) may also be considered. It provides:

Except for assignments of royalty interests all instruments of transfer of a lease or of an interest therein, including assignments of working interests, operating agreements, and subleases, must be filed for approval within 90 days from the date of final execution and, except for record title assignments, must contain all of the terms and conditions agreed upon by the parties thereto, together with similar evidence and statements as that required of an offeror under § 3123.2.

This section thus extends the requirements of 43 CFR 3123.2 to filing of transfers of interests generally. However, it specifically excepts assignments of royalty interests from being filed for approval within 90 days from the date of execution and apparently also from meeting the requirements of 43 CFR 3123.2. This may not be its intention but its wording is ambiguous.

The appellant has fulfilled all the requirements of 43 CFR 3128.6 as they are stated therein in its filing and is not required to do anything more under that regulation.

Thus, as pointed out, *supra*, the issue is not reached and decision is specifically reserved on whether or not an assignment filed for record purposes may be denied approval.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision appealed from is reversed.

ERNEST F. HOM,  
*Assistant Solicitor.*

**GRAZING PRIVILEGES IN CANYONLANDS NATIONAL PARK****National Park Service Areas: Land: Use—Act of September 12, 1964**

The Act of September 12, 1964, establishing Canyonlands National Park, authorized the issuance of renewal grazing privileges in the Park for a maximum of ten years beyond the termination dates of privileges in existence on the date of enactment.

M-36687

*March 17, 1966*

To: SECRETARY OF THE INTERIOR.

Subject: **GRAZING PRIVILEGES IN CANYONLANDS NATIONAL PARK.**

You have requested my advice as to the scope of authority to grant grazing privileges in Canyonlands National Park, as provided by section 3 of Public Law 88-590, 88th Congress, Second Session, September 12, 1964, 78 Stat. 934, 938. That provision reads as follows:

Where any Federal lands included within the Canyonlands National Park are legally occupied or utilized on the date of approval of this Act for grazing purposes, pursuant to a lease, permit, or license for a fixed term of years issued or authorized by any department, establishment, or agency of the United States, the Secretary of the Interior shall permit the persons holding such grazing privileges to continue in the exercise thereof during the term of the lease, permit, or license, and one period of renewal thereafter.

As written this section would appear to authorize the granting of grazing privileges in the park for one period after the completion of the term of privileges held on the date the statute was enacted. Since the words, "one period of renewal" are used a question arises as to whether the renewal period may be longer than the period of the privileges in existence on the enactment date. The legislative history of this provision indicates that the Congress understood that the existing privileges were the ordinary ten-year grazing permits issued by the Bureau of Land Management. The Congress does not appear to have been aware that only annual licenses were in existence at that time. The Conference Committee Report, House Report No. 1881, 88th Congress, Second Session, September 2, 1964, pp. 8-9, stated:

The third difference between the House amendment and the substitute recommended by the conference committee has to do with grazing permits, leases, and licenses within the Canyonlands National Park. The House had adopted language protecting the holders of fixed-term grazing permits during their term but forbidding any renewal thereof. The conference committee recommends a modification of this language to allow those who now hold such permits to renew them for one term. Since the basic law under which such permits are issued fixes their maximum term at 10 years, this will mean continuation of grazing within the park for, at most, 10 years beyond the expiration date of the present permits.

It appears to have been the intent of Congress to insure ten-year grazing privileges rather than a simple one-year extension, and thereafter to preclude further grazing. Accordingly the "one period of the renewal" language was intended to authorize the Secretary to grant such privileges for a maximum period of ten years.

It should be pointed out that this interpretation does not prevent proper range management in the Park during this period. The renewal grazing privileges must conform, as existing privileges must, to the Grazing Regulations for the Public Lands. These regulations authorize reductions in permissible grazing where necessitated by range depletion, 43 CFR section 4115.2-1(e)(5), or where the available grazing capacity has been diminished because of withdrawal, appropriation, selection or otherwise. 43 CFR 4115.2-1(e)(6).

Accordingly it is my opinion that section 3 of the Canyonlands National Park Act authorizes the granting to holders of privileges existing at the date of enactment, of extensions of these privileges for a maximum of ten years. Thereafter authority to permit grazing in the Park has been withdrawn.

EDWARD WEINBERG,  
*Acting Solicitor.*

## UNITED STATES v. ASBESTOS DEVELOPMENT CORPORATION

A-30476

*Decided March 24, 1966*

### Rules of Practice: Hearings—Notice—Mining Claims: Contests—Contests and Protests: Generally

In accordance with the pertinent regulations notice of hearing in a Government contest must be sent to the contestee in time for him to receive actual or constructive notice at least 30 days in advance of the scheduled date of the hearing, and, where such timely notice is not given, the contestee will not be chargeable with failure to appear at the hearing and a decision based upon the hearing from which he was absent will be set aside.

### Rules of Practice: Generally—Notice

Under the Department's regulations governing service of documents service by registered or certified mail may be proved by showing that the document required to be served could not be delivered to the addressee at his record address because of various reasons and, where such constructive service is relied upon, a document will be considered to have been served at the time of the return by the post office of the undelivered registered or certified letter.

### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The Asbestos Development Corporation has appealed to the Secretary of the Interior from a decision dated March 29, 1965, whereby

*March 24, 1966*

the Office of Appeals and Hearings, Bureau of Land Management, affirmed a decision of a hearing examiner declaring null and void the Blue Rock Mine and Blue Rock Mine Nos. 2 through 16 placer mining claims in Ts. 23 and 24 S., R. 6 E., and holding invalid the Water-Hole mill site in sec. 2, T. 24 S., R. 6 E., M. D. Mer., California. The mining claims were held null and void for lack of a valid discovery on any of the 16 claims, and the mill site was held invalid for the reason that there was no evidence that it was being used for any mining purpose.

Contest complaints were filed against the mining claims and the mill site by the Bureau of Land Management on July 22, 1963. The appellant thereafter filed an answer to the complaints, denying all of the charges contained therein. A notice dated October 22, 1963, and postmarked the same day in Sacramento, California, directing the parties to the contests to appear at a hearing before a hearing examiner in San Francisco, California, on December 6, 1963, was sent by certified mail to the appellant at its address of record, in care of Maurice E. Gomes, President, 1251 Ingraham Street, Los Angeles 17, California. The envelope containing the notice of hearing was returned on November 14, 1963, to the Office of Hearing Examiners in Sacramento marked "Unclaimed." On that same date the hearing examiner sent a letter to the appellant at the same address as before, stating what had happened and explaining that under Departmental regulations the attempted service of notice constituted constructive notice to the appellant. A copy of the notice of hearing was enclosed with the letter.

On November 20, 1963, the Office of Hearing Examiners received a letter from Gomes dated November 18, 1963, in which receipt of the letter of November 14, 1963, was acknowledged. Gomes explained that he had been unable to receive the undelivered notice for the reason that he had been recuperating for a little more than three weeks from a heart ailment and that upon his return to his office he found the certified mail slip but that when he called at the post office the certified mail had been returned. He stated that he did not see how he would be able to prepare for the hearing by December 6, 1963, and requested additional time to prepare for the hearing. The letter from Gomes bears a pencil notation "Denied by telephone 11-26-63 JAW M.B."

The record further shows that on December 6, 1963, the day of the hearing in San Francisco, the Office of Hearing Examiners in Sacramento received a letter dated December 4, 1963, from the appellant's secretary in which it was stated that Gomes was to see the doctor on the 6th of December for a blood check and count. Enclosed with the letter was a statement of Dr. Raymond Killeen that Gomes had been under his professional care and that because of his medical problems

it was not advisable for him to make the trip to San Francisco at that time.

The hearing was held as scheduled on December 6, 1963. At the outset of the hearing the hearing examiner stated:

Let the record show that Mr. Maurice Gomes is President of Asbestos Development Corporation and that on November 26, 1963, he requested a continuance of the hearing which was denied by telephone and he was advised that if any further reasons existed for the postponement of the hearing he was to notify the Hearing Examiner by telephone or telegram prior to the week of December 2.

Let the record further show that there is no appearance by or on behalf of the Contestees \* \* \*. Tr. 3-4.

Upon the basis of testimony presented thereafter on behalf of the Government the hearing examiner concluded that the Government had made a prima facie case in support of its charges which had not been refuted by any evidence from the mining claimant.

In affirming the hearing examiner's decision the Office of Appeals and Hearings rejected the appellant's contentions that it was not given an adequate opportunity to prepare for and attend the hearing, that there was no constructive service of notice of the hearing, and that the hearing examiner abused his discretion in failing to postpone the date of hearing after he was advised of the physical condition of Gomes. It held that the sending of the notice of hearing to the contestee at its address of record more than 30 days in advance of the hearing, and the return of the unclaimed certified mail, constituted constructive service and satisfied the requirements of the Department's regulations, and that the hearing examiner's further communication and mailing of a copy of the notice of hearing in no way affected the validity of the constructive service. It also found that in the circumstances of this case the hearing examiner had not abused his discretion in proceeding with the hearing. It concluded that the testimony and evidence adduced at the hearing supported the findings of the hearing examiner with respect to the validity of the mining claims and the mill site.

In its appeal to the Secretary the appellant contends, *inter alia*, that under Departmental regulations a document will be considered to have been served at the time of the return by the post office of an undelivered registered or certified letter, that under post-office regulations and practice an unclaimed certified letter is returned at the end of 15 days, that the attempted delivery in this case could not have been made prior to October 23, 1963, that the letter would not have been returned from Los Angeles until November 7, 1963, and could not have been received back in Sacramento before November 7, 1963. In these circumstances, it is argued, the appellant had, at the maximum less than the 30 days' notice of the hearing provided for by regulation.

The appellant's contention has merit. The Department's regulations governing hearing procedures provide in part that:

March 24, 1966

(2) \* \* \* Service by registered or certified mail may be proved by a post-office return receipt showing that the document was delivered at the person's record address or showing that the document could not be delivered to such person at his record address because he had moved therefrom without leaving a forwarding address or because delivery was refused at that address or because no such address exists. \* \* \*

(3) A document will be considered to have been served at the time of personal service, of delivery of a registered or certified letter, or of the return by the post office of an undelivered registered or certified letter. 43 CFR 1850.0-6(e).

In other words, when constructive service based upon the return of a certified letter as undelivered is to be relied upon, the date of such service at the very earliest<sup>1</sup> is the last day in which the document to be served is in the possession of the delivering post office and in which actual delivery to the addressee could be made.

The regulations further provide that in a Government contest:

The examiner shall fix a place and date for the hearing and notify all parties and the Bureau at least 30 days in advance of the date set, unless the parties and the Bureau request or consent to an earlier date \* \* \* 43 CFR 1852.3-2.

This last regulation can only be interpreted as meaning that a notice of hearing must be sent in time for all of the parties to receive the notice at least 30 days in advance of the hearing, for a different interpretation would permit the possibility that notice would not be received by a party until after the scheduled date of the hearing. Thus, in the present case, it was necessary that the appellant be served with notice, actual or constructive, at least 30 days before December 6, 1963, or no later than November 6, 1963.

As noted earlier, notice of the hearing was sent to the appellant by certified mail on October 22, 1963, in sufficient time to allow service on the appellant more than 30 days before the scheduled hearing in the normal course of mail delivery. It is not clear on what date delivery of the notice to the appellant was first attempted, but the face of the envelope bears a postmark of November 1, 1963, at Los Angeles, California. The reverse side of the envelope bears a postmark of November 13, 1963, at Foy Station, Los Angeles. It is apparent, then, that the notice was not returned by the post office as undelivered prior to that date and that constructive service, as prescribed by the regulation, was obtained no earlier. Since less than 30 days then remained before the scheduled date of the hearing, the requirement of 30 days' advance notice to the appellant was not satisfied. The fact that the appellant subsequently received actual notice of the hearing cannot cure the defect, for it was entitled to at least 30 days' notice. In these circum-

<sup>1</sup> We need not now determine whether the "time of \* \* \* return" is the date on which the letter is received at the office which mailed it or whether subparagraph (3) applies in situations other than those set out in (2).

stances the contestee should be afforded another opportunity to participate in the contest hearing and to submit its case on the merits.

In view of the foregoing conclusion it is unnecessary to consider other contentions of the appellant that it did not receive constructive notice of the hearing and that the hearing examiner abused his discretion in refusing to postpone the hearing at the appellant's request.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision appealed from is set aside, and the case is remanded to the Bureau of Land Management for appropriate action.

ERNEST F. HOM,  
*Assistant Solicitor.*

### APPEAL OF MERRITT-CHAPMAN & SCOTT CORPORATION

IBCA-365

*Decided April 8, 1966*

**Contracts: Construction and Operation: Payments—Labor: Wage Rates—  
Contracts: Disputes and Remedies: Equitable Adjustments**

Under a contract escalation clause providing for partial reimbursement to the contractor in the event of increases in wage rates, exclusive of subsistence payments, where new schedules of compensation paid by the contractor are based upon union agreements providing for successively higher increments of pay dependent upon the increasing degree of remoteness of the work site from the union office, and discontinuing previous arrangements for payments of sums designated as subsistence, the new compensation schedules are deemed to contain a measure of subsistence payments, but are determined also to require an equitable adjustment for amounts that are eligible for reimbursement under the escalation provisions of the contract.

#### BOARD OF CONTRACT APPEALS

This is the determination of an appeal from the January 9, 1963 "Findings of Fact and Decision by the Contracting Officer" issued by B. P. Bellport, then Acting Assistant Commissioner, Bureau of Reclamation in Denver, Colorado. This appeal arose from a disagreement of the contracting officer and Merritt-Chapman & Scott Corporation, the contractor, as to the legal interpretation and effect to be given to one of the clauses in the contract under which the contractor undertook construction of Glen Canyon Dam on the Colorado River. This contract was for approximately \$108 million.

This matter before the Board is, in most respects, very similar to the dispute which eventuated in our determination of January 4, 1961, in IBCA-240, 68 I.D. 1, 61-2 BCA par. 3193 (modified by the Board on November 9, 1961, 68 I.D. 363, 61-2 BCA par. 3194). As the parties were and are thoroughly familiar with the Board's resolution of the prior dispute as well as the entire record upon which this resolution

*April 8, 1966*

was based, we may dispense with repetition of some of the factual background set forth in the prior published decisions. It should be noted that the record in IBCA-240 was incorporated by reference in the present record.

The Board member who conducted the oral hearing in this matter and passed upon the admissibility of evidence and heard the statements and arguments of counsel, in normal course would have prepared the Board's decision. However, he died before this could be done. Because of the similarity of the case to IBCA-240, and to the excellent briefs submitted by counsel for both the appellant and for the Government, some of the difficulty attending the untimely passing of the hearing officer has been overcome.

Stripped of embellishment, the issue before the Board is a relatively simple one. We are called upon to determine whether or not the conversion to a zone system of wage rates for certain classes of special craftsmen from a plan under which subsistence had been paid resulted in the wage raises that were incorporated in the new zone system being eligible for escalation. If we find that the change was in fact only a substitution of terminology as to a part of the wage increases, we are called upon to determine just what part, if any, of the moneys paid by the contractor as wages under the new zone wage rates is in fact true wages and thus subject to escalation. Concomitantly, we must find and determine what if any part is, in fact, not wages and thus barred from escalation under the terms of the contract.

The problem we have posed springs from Paragraph 19 of the contract. Although we have discussed this key paragraph at some length in our prior decision, we set it forth again in order to provide a background for the discussion to follow.

Adjustment for changes in cost. All monthly estimates for payments as provided for in Clause No. 7 of the General Provisions, made for work performed during the first full weekly pay period after May 31, 1959, and thereafter, will be subjected to adjustment to compensate for change either upward or downward in the amount of wages paid to laborers and mechanics.

The amounts due under the contract will be adjusted by the amount of eighty-five percent (85%) of the difference between the total amount of wages actually paid to laborers and mechanics employed under the contract or any construction subcontract, and the total amount of wages that would have been paid if computed at hourly base rates determined as follows: For any classification of laborer or mechanic, the rate per hour to be used as a base for determination of the adjustment will be determined from the following sources in the order given: (1) from the rate per hour stated in Paragraph 16; if the rate cannot be so established, then (2) from the highest rate per hour for the classification as stated in any agreements in effect in the area and existing between labor union or groups and contractors on the date of the contract; or (3) if hourly rates cannot be established from any of the above sources, then the average of the hourly rate paid for the first 6 months for the labor classification for work under this contract will be the basic hourly rate.



In computing the adjustment in compensation to be made under this paragraph, illegal working time of laborers and mechanics; *payments in the form of bonuses, incentive payments, or gratuities, subsistence payments, and travel allowances*; and all costs of compensation insurance and other direct or indirect charges, contributions, or taxes, either State or Federal, applying to payrolls will not be considered. (Italics added.)

From the foregoing, it may be observed that the interpretation of the contract and the application of such interpretation are immensely important to the contractor and to the Government. The effect of the decision is to cast the cost responsibility for 85 percent of the escalated "wages" upon one or the other. The record indicates that the escalated amount may be in the neighborhood of \$800,000.<sup>1</sup>

### *The Contracting Officer's Decision*

The January 9, 1963 decision of the contracting officer undertook to dispose of the contractor's three claims for wage escalation submitted to him on April 24, 1962, relating to painters, plumbers and pipefitters, and sheetmetal workers. Also disposed of was a November 14, 1962 claim for escalation on payments to ironworkers.

The contracting officer's decision was made in the light of the Comptroller General's decision of 1960 (39 Comp. Gen. 668) and the Board's decision cited above. While the contracting officer considered each claim in detail, we are of the belief that the same principles are applicable to the claims relating to all four of the crafts. The differences are largely a matter of computation.

Chief among the bases for the rejection of these claims by the contracting officer is his finding that the prevailing practice relating to these specialty crafts was for the members of such craft unions to receive "subsistence," i.e., extra dollars above the basic wage, when working on jobs at some distance from their home base (which could be their permanent residence or their union office) no matter how long the job might last. His decision described the practice and the tradition in these trades, and concluded that "the contractor could not reasonably have expected that he would be relieved from the payment of subsistence for the 'specialty crafts' throughout the life of the contract." Thus, the contracting officer believed that the contractor had actually built an amount into its bid covering contract-long subsistence for these crafts or the equivalent. If the contracting officer's major premise is supported, it follows that any treatment of extra amounts masquerading as wages subject to escalation would amount to a windfall to the contractor.

If the contractor did not, in fact, include this increment in its bid, it was the contracting officer's position that it should have known

<sup>1</sup> The potential in IBCA-240 was in excess of \$3 million. The larger share of this amount related to wage escalation of the Five Basic Crafts. The Electricians, a specialty craft, were responsible for a smaller share.

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enough to have done so and now, if these sums are not treated as wages and not subject to escalation is only reaping the results of its lack of care and foresight.

The contracting officer considered the contractor's contention that the Glen Canyon job was so unsafe or hazardous that these crafts required higher wages for working on the project and that these conditions of the job rendered the contractor powerless to avoid the payment of a premium wage. He concluded that this contention lacked merit, taking into account accident statistics for this project as related to comparable jobs and citing the fact that the insurance premiums paid by the contractor were reduced during the course of the job based upon the contractor's accident experience as compared to that of the general industry. In summarizing his views in this regard, the contracting officer observed that the construction of Glen Canyon Dam was considerably less hazardous than similar construction operations throughout the State and Nation.

In answer to the contractor's contention that Page, Arizona, was such an unpleasant and unattractive place to reside that premium wages were needed as an inducement to workers to live there with their families, the contracting officer stated his belief that since its removal from "remote" status by the arbitrator for the State Joint Conference Board in January 1959, Page has been a desirable place to live, with good schools, churches, stores, and other business places, "lawns, and other advantages of a small city."

The contracting officer analyzed in detail the history of the wage agreements relating to each of the four crafts involved and how the zone-type wage mechanism had supplanted the subsistence-plus-wage arrangement in effect at the outset of the contract. A significant element of the findings is the showing that while the overall craft wage rate had increased on a yearly average basis of approximately five percent, the wage gain of craft members working in the Glen Canyon zone amounted to an additional 26.8 percent increase.

In the case of the painters, it was concluded that the entire zone differential of \$0.75 was subsistence and, therefore, not eligible under Paragraph 19 for escalation. In the case of the plumbers and pipefitters, the same kind of analysis was made as well as similar findings and conclusions. The plumbers' \$1 an hour increase in the farthest zone was characterized as subsistence and thus not eligible for escalation. A similar conclusion was reached for the claimed escalation of the wages paid to sheetmetal workers and the ironworkers with some differences in the analysis due to differences in the mechanics of their respective wage structures and agreements.

*The Previous Decision in IBCA-240*

Although the prior decision in IBCA-240 speaks for itself, it is of some significance here that in resolving the problem of "remote pay" for the Five Basic Crafts, we concluded that the appellant had shown a legitimate increase in wages for these crafts. We held, however, in the case of the electricians, that the appellant had not fully discharged its burden to establish that the Inside Agreement with its concentric wage zones reflected bona fide wage increases in its entirety for the purpose of escalation under Paragraph 19. We concluded that at the time of the bidding "appellant could have had only scant hope that subsistence costs for the electrical workers could be eliminated by the furnishing of houses, trailer sites and other facilities."<sup>2</sup> The Board was also impressed with the ease with which the electricians had received their "wage" increase from \$3.45 an hour to \$4.90 an hour, an increase of more than 42 percent. We determined that only a part of the extra \$1.10 an hour in the \$4.90 Zone D hourly rate for electricians was in fact wages subject to escalation. We concluded that \$0.80 an hour should be considered as the wage component of the increase, and thus subject to escalation under the contract.

*Discussion of the Evidence*

We have painstakingly examined all of the record in this matter to see what, if any, distinction can be made between these claims and the claims disposed of in IBCA-240. Counsel for both the appellant and the Government made efforts to present more definitive evidentiary data than the Board had been furnished in the prior matter. However, neither counsel has made any particular effort to square his present contentions with the salient points of our prior decision nor to point up the differences, if any, between the matters with a view to causing the Board to reach a different result or to encourage us to apply different criteria in our analysis of the zone wage rates of the painters, the plumbers and pipefitters, the sheetmetal workers or the ironworkers. Yet, it is clear that the genesis of the zone rates for all of the specialties we are considering here and the simultaneous elimination of subsistence as a recognizable item followed a pattern parallel to that of the electricians.

We do not feel that it would be profitable to undertake to examine in detail the semantics of the matter. The word "subsistence" means different things to different people. To the working man and the housewife who are paying the rent and buying the groceries, a dollar

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<sup>2</sup> In our March 15, 1962 reconsideration of the modified decision of November 9, which appears in 69 I.D. at page 11 *et seq.*, 1962 BCA par. 3321, we discussed this statement in relation to the result we had reached in that matter, and the allegation that this conclusion was inconsistent with the result reached.

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is simply a dollar. And it is clear from this record that in the transition of Page from a rough construction camp to a community with many, if not most of the amenities of other Arizona communities of comparable size, at some point in time there was at least a partial decrease of the pure "subsistence" nature of the extra money paid to the various craftsmen, using that word in the sense it was used in the labor agreements.

We have not viewed the matter of the *form* of the extra payments to the craft members as of overriding significance, despite the unfortunate use of the phrase "in the form of" in Paragraph 19, which almost seems to have invited the subterfuge the contractor is inferentially accused of here.

The evidence in the record on this appeal is extremely limited as to whether the contractor actually included in his original bid an increment for the life of the contract, for subsistence or premium pay not subject to escalation in his original bid. Statements as to this by the contractor's employees are subject to infirmity as self-serving, but there is no better source of reliable data on this point. We believe that the record demonstrates that the contractor should have protected itself to some extent in view of the general practice or custom in the labor relations field.

It is true, of course, that all of the formal craft agreements defined subsistence as "away-from-home" pay, and sought to protect, for example, a sheetmetal worker who was doing some work on a school or business establishment that required a few weeks out of town (Phoenix) at the most, and who would incur greater out-of-pocket expense for a relatively short period. Glen Canyon Dam created a special situation, however, because it was obviously to be a very long job which called for the creation of a new community. The formal craft agreements under which the dam was initiated were not written with Glen Canyon in mind. The contractor might have been able to anticipate that at some time in the course of the work the subsistence payments, as such, would not be "away-from-home" pay, but actually converted into wages, and, thus, it could be relieved of them as a technical matter under the existing craft agreements. However, it seems appropriate to conclude that he could have never entertained any realistic hope that the worker's take-home dollars in this inhospitable area would be decreased to the Phoenix scale. Only if some kind of device were in being to analyze each worker's case individually as to when his extra out-of-pocket expense actually due to being away from home and family ended could a cutoff of subsistence have been truly effective. However, if the extra \$5 to \$8 a day were paid for just a few weeks beyond the period when actual extra away-from-home, out-of-pocket expenses were incurred, the individual family in-

come needs would be so adjusted to the higher dollar income level as to make any downward movement almost impossible to achieve. Of course, all of these matters are not treated on the basis of an individual worker and his family nor is it practicable to so consider them so. The various types of craftsmen are treated and do their bargaining as classes. Thus, it can be that under the system prevailing in Arizona, which was hardly unique, some men within a class could be receiving without real justification dollars labeled "subsistence" for an extended period before provisions of the union agreement relieving the contractor of payment of dollars labeled "subsistence" to the class could be brought into play. If a contractor were not successful in "going off remote" this could go on indefinitely—perhaps to the end of the job. As has been discussed in our former decision, the record shows that this contractor went to considerable lengths to qualify Page as a non-remote community.

We are not impressed by the contention that the Internal Revenue's treatment of these extra dollars had significance here. The Internal Revenue approach is a pragmatic one. If a worker actually incurred special away-from-home expenses, he could claim these for tax purposes, whether they were reimbursed by amounts labeled "subsistence" or "wages." It was not established that adoption of the zone-rate system had a bearing on income taxation and the individual's right to claim deductions successfully. It is possible that the workers wanted that part of the wages labeled "subsistence" relabeled wages and blended into the wage scale so that all of the various deductions could be made on the whole amount and, particularly, so that pay for the extensive overtime work could be calculated on a higher hourly basis.

Despite our conviction that the contractor should have included an increment for subsistence or for a payment in lieu thereof which would have not been subject to escalation, the Board believes here, as it did in the case of the electricians, that the contracting officer has gone too far in excluding the "zone" increases from eligibility for escalation.

We are convinced that the contractor intended and expected to "go off remote" whenever this could be accomplished. It expended large sums with a view of succeeding in such effort. Further, we believe the contractor bid this contract with that expectation in mind. The renegotiation of the various agreements and the creation of new zone rates (which, it would seem, was not too difficult for all concerned except the Five Basic Crafts) canceled any benefits the contractor might have achieved otherwise by "going off remote." The failure of the contractor to have vigorously contested these changes in the specialty craft agreements weakens the force of its claim for escalation of the entire amount. Our conviction that no windfall in favor of the contractor should result provides a basis for an apportionment of the "wage" increase which is derived from the zone system.

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Having concluded that the payments to these craftsmen based upon the zone rates should be treated herein as wages in some part at least, we must also dispose of the contractor's contention that the particular circumstances of this job made inescapable his payment of the full amount of wages in excess of the Phoenix scale. The evidence in this area is in rather hopeless conflict. First, as to safety conditions, we believe that the record on this subject sustains the contracting officer's view that the Glen Canyon Dam, despite its magnitude and scope did not present unusual or especially severe working conditions for skilled employees in the lines of work involved here. However, those conditions certainly were not as attractive as those in other types of construction jobs such as residences or small commercial buildings.

All large dam construction is hazardous in a sense, and an untrained or inexperienced workman would be appalled by the apparent hazards of high walls, deep tunnels, extreme heights and the swarming of all kinds of workmen. But we are dealing here with classes of skilled and experienced men, for the most part. We cannot find that there has been sufficient proof that the skilled workmen in the trades involved in this appeal could reasonably have expected premium wages on the basis of the hazards on the project. Accordingly, we must find with the contracting officer, that such hazards did not call for or require premium wages.

We find some merit in the contractor's contention that the City of Page and its environs were of such nature as to make the payment of higher wages necessary to attract and keep a full labor force. It is true that Page was and is somewhat isolated, and that many of the facilities of larger, older communities were not available at Page when the zone rates were instituted and may never be. There are many inconveniences inherent in living in a small, isolated community especially after one has resided in a larger, more developed one. The data supports to some extent the thesis that Page is a uniquely uninviting community by western or even Arizona standards.<sup>3</sup> The Board does not regard the showing on that point as overwhelming by any means. The contractor has not succeeded in establishing that either the safety conditions at Glen Canyon or the environmental discrepancies of Page were determinative in stimulating the *entire* "wage" increase sought to be escalated under the contract. We have, however, weighed these intangible aspects of the matter in arriving at the apportionment set forth below.

### *Conclusion*

It is the conclusion of the Board that despite the extended record made in this matter, our treatment of it should substantially accord

<sup>3</sup> It is interesting to note that the Bureau of Reclamation provides an adjustment in the monthly quarters rental for Bureau personnel in Page known as an "adjusted isolation deduction."

with the result reached in IBCA-240. By this statement, we do not mean to infer that we cannot depart from the method of disposition of that prior case because of an attitude of rigidity or any concept of *stare decisis*. While it is true that uniformity in administrative determinations is highly desirable, the achievement of equity and substantial justice to the claimant and the Government under the terms of the contract is of primary importance.

In our decision in IBCA-240 relative to the electricians we determined that there was an entitlement to escalation on \$0.45 of the \$1.10 in dispute. Thus, about 41 percent was found to be subject to escalation. Taking all circumstances in this case and the entire appeal record into account, the Board concludes that escalation under Paragraph 19 should be granted for 41 percent of the increases above the base or free zone rates for the crafts under consideration (painters, plumbers, sheetmetal workers and ironworkers). To that extent the appeal is sustained.

One matter remains for consideration, although the problem may be moot, and that is the motion of the appellant to strike from the record portions of a certain deposition by one Lee E. Knack. Also, we can dispose of the Government's motion to admit into evidence portions of the same deposition which the hearing officer rejected as evidence and which were not read into the record. We believe that reasonable latitude should be permitted in the taking of depositions for the purpose of discovery and for perpetuating testimony and that this device is a very useful tool for pre-trial preparation. However, the better practice in the absence of a stipulation by counsel is to utilize depositions as such in a hearing only upon a showing that the witness is reasonably unavailable and thus cannot be presented, or for purposes of impeachment. More inconvenience is not, in our view, a sufficient basis for incorporation of a deposition into a hearing record in lieu of live testimony.

In the instant matter, the appellant's able counsel participated in the deposition, albeit unwillingly, so in fact every right of the appellant was protected. Full opportunity to cross-examine was afforded. Also the appellant's rights were preserved to submit objections to the testimony and argument in support of such objections at the hearing. Because of this participation and consequent protection of its rights in this instance, we are not called upon to discuss the admissibility of the document had such participation not occurred. We are inclined to believe that necessity would have been the only basis for proper admission in such event.

We have examined Mr. Knack's deposition in only such parts as were permitted by the hearing officer to be read into the record. And even as to such included parts, we believe they bear only on the question of what the contractor might better have known or done when

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it prepared its bid, and that those parts are not relevant to what it did not know or did not do. In some respects, Mr. Knack's testimony tended to assume the Board's function of determining the issues in this matter, and has been of negligible importance in our consideration of the whole record.

Both motions are, accordingly, denied.

WILLIAM J. COSTELLO, *Alternate Member.*

WE CONCUR:

DEAN F. RATZMAN, *Chairman.*

THOMAS M. DURSTON, *Deputy Chairman.*

### APPEAL OF GENERAL ELECTRIC COMPANY

IBCA-451-8-64

*Decided April 13, 1966*

**Contracts: Construction and Operation: Actions of Parties—Contracts: Construction and Operation: Construction Against Drafter**

Where the Government contends that the terms of the contract for a digital dispatching system require a contractor to furnish not only the computer program essential for its operation in calculating transmission system losses, but also additional computer programs that would be required under varying conditions resulting from contemplated future changes or additions to the system and where the contractual provisions relied upon by the Government are found to be ambiguous from several standpoints, the rule of *contra proferentem* will be followed and the ambiguous contract provisions will be construed against the Government as the drafter.

**Contracts: Construction and Operation: Warranties—Contracts: Construction and Operation: Construction Against Drafter**

The Government's claim of an implied warranty of fitness for a particular purpose will not be recognized where the only indications of notice to the contractor of the particular purpose for which the system ordered under the contract is required, in so far as the matter in controversy is concerned, are the ambiguous provisions of an invitation for bids which are reasonably susceptible of the contrary interpretation placed upon them by the contractor, particularly when viewed in the light of the conduct of the parties both prior and subsequent to the award of contract.

**Contracts: Construction and Operation: Generally—Contracts: Construction and Operation: Actions of Parties—Rules of Practice: Appeals: Burden of Proof**

Where in construing a contract for a digital dispatching system the contractor's interpretation excludes any obligation on its part to furnish a single set of B-constants for calculating transmission system losses, but concedes that it is required to furnish as a part of the system an economic dispatch program including water optimization and transmission losses and



that one set of B-constants is essential for an accurate consideration of transmission losses, and hence it appears that one set of B-constants must be furnished in order to complete the system, the contractor's interpretation of the contract requirement is unreasonable, precluding the doctrine of *contra proferentem*, notwithstanding the contractor's unsupported assertion that a trade practice and precedents substantiate its interpretation.

#### BOARD OF CONTRACT APPEALS

The contractor has timely appealed the contracting officer's Findings of Fact of April 7, 1964, and Supplemental Findings of Fact of July 2, 1964, by which it was "directed to furnish with the required equipment, and at no additional cost, the computer program<sup>1</sup> necessary for the calculation of the B-constants,<sup>2</sup> which are required for the use of the equipment." Neither party having requested a hearing, the case will be decided on the basis of the appeal record.

The questions presented for decision are: (i) is the contractor required to furnish a computer program for the calculation of B-constants for use in determining transmission losses (both in the system as specified and after contemplated changes have been made therein) by reason of (a) the terms<sup>3</sup> of the contract or (b) an implied warranty of fitness for a particular purpose; if not so required, (ii) is the contractor obligated to furnish one set of B-constants<sup>4</sup> for use in determining transmission losses in the system as initially installed by reason

<sup>1</sup> Both parties use the singular and plural forms interchangeably. Except when quoting or when referring to a particular passage in which the plural form appears, the term "program" will be used throughout the opinion.

<sup>2</sup> In its Memorandum of Arguments of July 28, 1964, the appellant provides the following background information: " \* \* A dispatch computer, analog or digital, is for the purpose of economically distributing the load between the available generators. When it is desired to consider in this distribution the losses in the transmission lines, a transmission loss formula involving 'B-constants' is used in any dispatching computer; analog or digital, as now furnished by General Electric or other domestic suppliers. The 'B-constants' are a group, or matrix, of numbers, peculiar to the specific system. As a group, they are one of the parameters inserted in the economic dispatch program on a digital computer, \* \* \*. They are not peculiar to digital dispatching systems. Before the advent of digital dispatching systems, General Electric had invested in the development of computer programs to make the calculations to determine B-constants and had provided this service, when desired, for a fee. \* \* \* " The Government appears to be in substantial agreement with this statement but apparently contests the assumption that in the present state of the art the use of B-constants is the only method available for calculating transmission losses.

<sup>3</sup> The Government has characterized one of these terms as an express warranty. The provision in question, to which the contractor acceded, was set forth in Supplemental Notice No. 2 to the invitation and reads as follows: " \* \* (1) The bidder warrants that the equipment offered in his bid is in strict accordance with the provisions of this invitation, notwithstanding any variance between descriptive material furnished and the provisions of this invitation, and the bidder further warrants that he is ready, willing and able to comply with all the requirements of this invitation."

<sup>4</sup> The contractor's obligation to furnish one set of B-constants was not expressly covered by the contracting officer's findings of fact which directed the contractor to furnish the program. Both parties have repeatedly differentiated between a program for the calculation of B-constants and one set of B-constants, however, and the question is considered to be before us for decision by reasons of the statements made in the findings of fact and the correspondence which preceded it, as well as the arguments made by both the Government and the contractor on appeal.

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of (a) the terms of the contract or (b) an implied warranty of fitness for a particular purpose.

The contract, awarded under date of May 29, 1963, was on Standard Form 33 (October 1957 Edition) and incorporated the General Provisions of Standard Form 32 (September 1961 Edition) for Supply contracts, as well as special provisions, specifications and drawings for the particular procurement. For the lump sum of \$455,439, the contractor was required to furnish twelve items as described therein, including the following principal items:

Item No.	Articles or Services	Amount
1	Furnishing, installing and <i>making operating checkout</i> of one (1) set of multiple-plant load frequency control equipment (including digital computer and peripheral equipment, dispatcher's console, dispatcher's instrument board, automatic data logging equipment, and related telemetering equipment) for the Montrose Power Operations Center, <i>complete</i> in accordance with this invitation, including shipment to site of installation at Montrose, Colorado. * * *, for the lump sum of-----	\$378, 149

(The foregoing price shall include the cost of the following which is required for the equipment under this invitation for the Montrose Power Operations Center: *programs* and programming aids as required by Paragraph D-10; *programmer* and operator training as required by Paragraphs D-11 and D-12, respectively; and 1 year's maintenance and maintainer training as required by Paragraph D-13.) *Complete installation and checkout* of the equipment under Item 1 will be made within 390 calendar days after date of receipt of notice of award of contract. \* \* \*

Item No.	Articles or Services	Amount
2	Furnishing, supervising installation and <i>making operating checkout</i> of one (1) set of load frequency control and related telemetering equipment for Flaming Gorge Powerplant, <i>complete</i> in accordance with this invitation, including shipment to site of installation near Dutch John, Utah * * *, for the lump sum of-----	\$17, 150
* * * * *		
3	Furnishing, supervising installation and <i>making operating checkout</i> of one (1) set of load frequency control and related telemetering equipment for Glen Canyon Powerplant, <i>complete</i> in accordance with this invitation, including shipment to site of installation near Page, Arizona * * *, for the lump sum of-----	\$26, 650

(Italics supplied.)

*Program for B-Constants As Contract Requirement*

Fundamental to the Government's position is the interpretation that it has placed upon Paragraph D-10 of Technical Requirements, Specific of the Contract, reading in pertinent part as follows:

D-10. *Programs and Programing Aids*

The contractor shall furnish the following program packages for the computer being furnished and the power system to be controlled: \* \* \* (e) Programs for load-frequency control and economic dispatch including water optimization and transmission loss computations.

The Government's view of the matter is stated in the Supplemental Findings of Fact of July 2, 1964:

Accordingly, to meet the performance requirements of the invitation, namely, to provide any adequate economic dispatch system, the program developed for calculating the B-constants is an essential integral part of the economic dispatch program and should therefore be furnished as a contract requirement. As a matter of fact, we cannot read Item IV.B.7c(2)<sup>5</sup> of the description of your Economic Dispatch Program contained in your bid proposal (page IV-11) otherwise than as promising to supply us the computer program for calculating the B-constants.

As the Government concedes that the furnishing of one set of B-constants would suffice for the system as initially installed and as it has nevertheless directed the contractor to furnish a program for calculating B-constants (necessary only if changes to the system are to be considered), it attempts to support the imposition of the more comprehensive requirement on two grounds, viz., (i) the contract requires the furnishing of a complete digital dispatching system, and (ii) the contract specifies the future additions that are to be made to the system as initially required to be furnished.<sup>6</sup> The significance attached by the Government to the contract's provisions respecting future additions is clear from the contracting officer's directive of April 7, 1964, in which he stated:

We regret any misinterpretation you may have made of the requirements of our invitation, but trust that upon reflection and thorough consideration you will readily appreciate that we required and called for a complete system, adaptable for adequate operation for many years throughout changing and variable pertinent conditions, and with no recurring necessity of securing data from the contractor.

<sup>5</sup> The cited provision reads: "7. *Economic Dispatch Calculation* \* \* \* c) Parameters \* \* \* 2) Loss formula coefficients (B-matrix): a. Up to 50 entries in B-matrix."

<sup>6</sup> Paragraphs D-1, D-2-a, and D-2-b. Technical Requirements, Specific, are the principal contractual references relied upon by the Government. In pertinent part these references provide: "D-1. *General* Under this invitation there shall be furnished a complete digital dispatching system that is suitable for and has as its primary purpose the automatic tie-line load-frequency control of 1 control area of a large inter-connected power system. The equipment furnished shall provide for the control of 11 area-boundary tielines and 4 hydroelectric-generating stations, and 2 steam-generating stations. In addition, provisions shall be made for future additions of area-boundary tielines and controlled generating stations. \* \* \* D-2. *Load-frequency Control Requirements* a. Area requirements control. \* \* \* Provisions shall be made to permit the future addition of 5 future adjacent control areas and 15 future tielines. \* \* \* b. Generation allocation control. \* \* \* The equipment furnished shall also be suitable for the control of four additional future power-plants having five units each and the dispatcher's console shall be provided with space only for these additional plants and units. \* \* \*" That the items called for are to be "complete" is also specified in all twelve items in the contract schedule.

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The appellant does not deny that the provisions cited by the contracting officer are germane to the dispute but advances the following arguments: (i) the program for calculating the B-constants is not a part of the Economic Dispatch Program, but is a separate means of obtaining one of the parameters used in the dispatch program; (ii) the program (B-constants) is at least as separate and distinct as any of the other programs listed in the invitation and it should have been listed if it were to be included in its competitive bid price; and (iii) the listing of information pertaining to B-constants on page IV-11 of the bid proposal was simply the recording of information likely to be helpful to the user—the fact that the parameters on all of the dispatch programs specify information to be provided by the user is said to be consistent with this contention.

Commenting upon the reliance the Government has placed upon the fact that the contract provides for additions to the system, the appellant, in the Memorandum of Arguments submitted in support of the appeal, states:

\* \* \* Such system changes will in all probability require changes in material also—in telemetering, etc. It must be clear that we were bidding to a specified system, the number of telemetering readings and physical system being spelled out in full detail. The contention that either the material or programs supplied now should be adequate for all possible future conditions is completely untenable. There can be no argument that the programs for calculating B-constants should be furnished unless future and unspecified conditions, as well as the specified conditions, are claimed to be covered by the invitation.

Before considering these central contentions of the parties, we briefly note other propositions advanced by them. Although stated as if they were postulates, they are, in fact, susceptible to summary disposition. The Government, for its part, appears to attach considerable significance to the fact that not only did the appellant take no exception to the terms of the invitation but also expressly warranted that the equipment offered was in strict accordance with the requirements of the invitation. The validity of this position is wholly dependent, of course, upon the clarity of the invitation to which the bidder took no exception and as to which it gave the express warranty. If under the terms of the invitation, the appellant is not clearly obligated to furnish a program for the calculation of B-constants, the fact that no exception was taken to its provisions or that an express warranty was given, neither increases nor decreases the obligations assumed by the appellant thereunder.

The appellant also places considerable stress upon matters having no direct bearing upon the resolution of the issues presented by this appeal. It emphasizes that: (i) there is no precedent for the position taken by the Government; (ii) there is an accepted trade practice

which corroborates the interpretation that it has placed upon Paragraph D-10 of the contract and upon the meaning to be ascribed to the Economic Dispatch Calculation as set out in page IV-11 of its proposal; and (iii) the Government's position that the appellant intended to offer a program for the calculation of B-constants is untenable, when considered in the light of the underlying economic factors.

In support of the first contention the appellant adverts to the fact that its other digital dispatch computers and seven of its analog dispatch computers are all operating successfully using B-constants, and that the programs for calculating the B-constants were not supplied to these other users as part of the system. The relevance of practices followed under other contracts with other parties is open to serious question. Furthermore, the appellant has offered no evidence in support of this allegation. More allegations are not, of course, acceptable as proof.<sup>7</sup>

Proof of an accepted trade custom or practice is frequently an important aid in the proper construction to be given to the provisions of a particular contract.<sup>8</sup> The difficulty here, however, is that except for the appellant's unsupported assertions, there is no basis for concluding on this record that there was, in fact, any such trade practice.<sup>9</sup>

The appellant cites several economic factors as mitigating against the proposition that it could have intended to offer the programs in question or that Paragraph D-10 of the contract can be construed as requiring that they be furnished, viz.: (i) the programs it has developed have never been sold or offered for sale, being required as tools, a form of production facility, the output of which is sold; (ii) the programs represent a tremendous investment, competitive advantage, and a source of income; (iii) the appellant may not, without the consent of a collaborator, sell the programs; and (iv) a holding that the appellant is required to furnish the programs in question would place the Government in a position to compete unfairly, i.e., costlessly, with the appellant and would deny it the fruits of its initiative and investment. These factors might be pertinent to the issues raised by the instant appeal, if there were any evidence to support the view that, in advance of contract, the Government was aware of their existence. In the absence of such evidence, the Board concludes that the several

<sup>7</sup> *American Ligurian Company, Inc.*, IBCA-492-4-65 (January 21, 1966), 73 I.D. 15, 66-1 BCA par. 5326.

<sup>8</sup> This is true even where the contract language appears on its face to be perfectly clear and unambiguous, provided the contractor shows that, by reason of trade custom or usage, such language has a meaning different from the ordinary meaning. *Gholson, Byars & Holmes Construction Company v. United States* (Ct. Cl. No. 349-63, October 15, 1965). See also 46 Am. Jur., Sales, sec. 295.

<sup>9</sup> See *Eder Electric Co. v. United States*, 205 F. Supp. 305 (1962), in which the Court defined a trade custom as one established by evidence "so clear, uncontradictory, and distinct so as to leave no doubt as to its nature \* \* \*."

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economic factors mentioned only have relevance to the subjective intent<sup>10</sup> of the appellant.

The certitude which characterizes the present attitude of both parties to the dispute is in marked contrast to the tentative nature of their respective positions during the first ten months of contract performance. At least as early as July of 1963, a member of the contractor's technical staff had noted a definite need for a better rapport between the Government personnel responsible for the technical phase of the work and their counterparts in the contractor's organization. With this objective in view, the contractor proposed that a conference be held in Denver on August 30, 1963. This proposal met with the approval of the Government and a conference was held on that date.

Prior to the conference, however, the contractor, by letter under date of August 13, 1963, proposed a number of questions for discussion at the meeting, and made the following statements directly related to the matter now in controversy:

3. Transmission loss coefficient matrix—Transmission losses will be represented in the program by the transmission loss coefficient, "B," matrix. Each metered tie point and each plant will be an axis in the matrix. Division of adjacent control area loads over the ties will be by distribution factors.

I assume that actual numerical values for the loss coefficients will be supplied you as will the distribution factors. Would you please confirm this.<sup>11</sup>

It is apparent, however, that if the contractor's position respecting "transmission loss coefficient, 'B' matrix" and its assumptions concerning "actual numerical values for the loss coefficients" were discussed at the conference held on August 30, 1963, the questions were not resolved. More than five months later the answers were apparently still in doubt, for under date of February 14, 1964, the contracting officer advised the contractor:

3. The Department has expressed concern over the possibility that your company may not furnish the computer programs required to perform the backup calculations necessary for the satisfactory operation of the Montrose computer. Particular reference is made to the program for the calculation of B constants. If it is the intent of your company to use B constants in the calculation of transmission losses on the Montrose computer, is it also your intent to furnish the Bureau of Reclamation with the computer program required to calculate the B

<sup>10</sup> Understandings or thoughts of one party to a contract, of which the other party was reasonably unaware cannot be used as a foundation for binding the latter to the meaning which the former placed on the words of the contract. *Erhardt Dahl Andersen, IBCA-223* (December 1, 1961); 68 I.D. 342, 61-2 BCA par. 3219 and authorities there cited.

<sup>11</sup> In its Statement of Position the Government treats the terms "specific values of B-constants" and "loss formula coefficients" as interchangeable, stating: "\* \* \* not until the Bureau's receipt on March 4, 1964 of the appellant's letter of March 3, 1964 (paragraph 3) did the appellant inform the Bureau that the appellant did not intend to furnish either the specific values of B-constants, synonymous with the loss formula coefficients (B-matrix) specified by the appellant, necessary for the ascertainment and disclosure of the transmission losses, or any program therefor for the determination of the specific numerical values of the B-constants required for those purposes.\* \* \*".

constants or, as an alternative, to calculate the necessary B constants for the Bureau, either alternate to be at no additional cost to the Bureau?

By letter under date of March 3, 1964, the contractor replied:

3. The General Electric Company Proposal 187-03075 did not include either the specific numerical values for the B constants or the programs for the calculation of these numerical values. We will be glad to calculate these values; the cost for the determination of one set of B constants for your system is approximately \$2,000. These values are normally provided or obtained by the user, and were not considered to be a part of your invitation. We know of no precedent in which the vendor supplied either the numerical values or the programs for their calculation, and Invitation DS-5921 follows this precedent.

Thereafter the contracting officer issued the previously mentioned directives of April 7 and July 2, 1964, from which the instant appeal was taken.

Both parties have sought to strengthen their positions by resort to the appellant's bid proposal. Because of this and the fact that the bid proposal is specifically referenced on the face page of the contract, the pertinent provisions of the bid proposal will be considered to the extent that they are supplementary to or explanatory of provisions in the contract that are not otherwise clear.<sup>12</sup>

Addressing itself to the Government's argument that its proposal offered a program for the calculation of B-constants, the appellant states:

\* \* \* USBR is claiming, in effect, that because we helpfully record the fact that loss formulae coefficients (B-matrix) are one of the parameters, or arbitrary data, to be used in the dispatch program, we are therefore obligated to furnish to USBR computer programs to calculate these coefficients. USBR does not direct that we provide means for calculating, for all time, the other (similar) parameters for programs 6 through 11. Clearly the information we list as Parameters is provided by the user for use in the programs being described. \* \* \*

Although obviously contesting that the parameter for program 7 specifies information to be provided by the user, the Government has not disputed the contractor's assertion that the information listed as parameters for the other dispatch programs involves information to be provided by the user; nor has the Government undertaken to show why program 7 should be treated differently than the other dispatch programs.

The Government attempts to bolster its position by referring to the contract provisions (paragraphs D-1, D-2a. and D-2b.) relating to future additions to the system. We have difficulty in attributing significance to these provisions because (i) the appellant does not appear

<sup>12</sup> See *Loftis v. United States*, 76 F. Supp. 816 (Ct. Cl. No. 46078 1948) (intention of parties to contract is to be gathered from the whole instrument read in the light of the circumstances existing at the time of the negotiation leading up to its execution). Cf. *Land Air, Inc.*, IBCA-192 (November 30, 1959), 66 I.D. 402, 59-2 BCA par. 2403 (technical proposal accompanying bid and explanatory covering letter considered to be part of contract).

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to have denied that it is obligated to furnish a system which will accommodate the contemplated additions at a later date; and (ii) the language in which the provisions for additions is couched appears to be compatible with the view that furnishing such a system is the extent of the appellant's obligation.

Throughout our perusal of the appeal record we have remained cognizant that the overriding consideration in interpreting a contract is the intention of the parties<sup>13</sup> as gleaned from the contract language employed,<sup>14</sup> the circumstances surrounding the execution of the contract,<sup>15</sup> and the conduct of the parties.<sup>16</sup>

Applying this cardinal principle to the instant appeal, the Board concludes that under the terms of the contract the appellant is not required to furnish a program for the calculation of B-constants. While the language of Paragraph D-10 is sufficiently comprehensive and general to support the construction placed upon it by the Government, it may not be viewed alone.

Any doubt existing as to the meaning of the contract language employed is removed by the Government's own actions during the first ten months of contract performance. The Government's position is seriously undermined by its six-month delay in making any written reply to the contractor's letter of August 13, 1963, in which confirmation was requested of the assumptions upon which it was proceeding in reference to the transmission loss coefficients. Even when the contracting officer replied by letter under date of February 14, 1964, the letter posed questions rather than providing answers. Yet at the time this letter was written, the Government knew, or should have known, everything it now relies upon. It knew the terms of the invitation and the resulting contract. It knew the provisions of the bid proposal. It knew the purpose for which the equipment was being procured.

The Board finds that the contract provisions relied upon by the contracting officer for the finding that the contractor was obligated to furnish a program for the calculation of B-constants are ambiguous. The Board further finds that the appellant's interpretation of such provisions, in so far as such interpretation relates to the furnishing of a program for the calculation of B-constants, was not unreasonable.<sup>17</sup>

<sup>13</sup> The primacy of the intention of the parties was emphasized in the recent case of *Davidson Optonics, Inc.*, ASBCA No. 10835, 65-2 BCA par. 5235, in which the Board stated: "\* \* \* It is elementary, of course, that contracts must be interpreted in accordance with the true intent of the parties, and the surrounding circumstances of their negotiations are taken into account in finding their legally effective intent. \* \* \*

<sup>14</sup> *Loftis v. United States*, note 12, *supra*.

<sup>15</sup> *Davidson Optonics, Inc.*, note 13, *supra*. *Loftis v. United States*, note 12, *supra*.

<sup>16</sup> *Flora Construction Co.*, IBCA-180 (June 30, 1961), 61-1 BCA par. 3081. *Land-Air Incorporated*, IBCA-211 (January 13, 1961), 61-1 BCA par. 2897.

<sup>17</sup> *Pater Kiewit Sons' Co. v. United States*, 109 Ct. Cl. 390 (1947) (justice and equity require that contractor's reasonable construction of specifications drafted by the Government be adopted).



and that the ambiguity was not so patent as to impose an obligation upon appellant to seek clarification prior to bidding.<sup>18</sup> Accordingly, the Board concludes that the rule *contra proferentem* is for application.<sup>19</sup>

*Implied Warranty of Fitness as Requiring Program for B-Constants*

We turn now to the question of whether, by reason of an implied warranty of fitness for a particular purpose, the contractor is required to furnish the program necessary for the calculation of B-constants. In the Government's Statement of Position, the argument is presented in the following terms:

The Government contends that the Colorado Uniform Sales Act<sup>20</sup> and the common law require that in instances wherein articles are purchased for the fulfillment of specific purposes of which the vendor is informed, his agreement to furnish such articles includes his implied warranty that the articles furnished will suffice to fulfill the specified purposes. \* \* \* the contract states the specific purposes for which the equipment is to be manufactured and requires equipment *complete* for the *automatic* accomplishment of those purposes. \* \* \* (Italics in original.)

The Department Counsel cites no Colorado cases in support of the position taken and our own research has failed to disclose a case in Colorado or elsewhere where the facts involved were even remotely similar to those presented in the instant appeal. Therefore, we shall undertake to apply the general principles of law applicable to implied warranties.

A threshold question is the particular law that should be invoked in determining the rights of the parties. In the case of *Whitin Machine Works v. United States*, 175 F. 2d 504 (1st Cir. 1949), after questioning whether the law of any particular state is applicable to a case involving rights and liabilities under a contract with the United States and intimating that the law to be applied is a general federal common law of sales, the court stated:

<sup>18</sup> *Ring Construction Corp. v. United States*, 142 Ct. Cl. 731 (1958). *Jensen Ready Mix Co., Inc.*, IBCA-157 (June 5, 1961), 61-1 BCA par. 3059.

<sup>19</sup> *Barringer & Botke*, IBCA-428-3-64 (March 23, 1966); *Northern Electric Corp.*, IBCA-194 (August 29, 1962), 1962 BCA par. 3494; *Framlau Corporation*, IBCA-228 (August 18, 1961), 61-2 BCA par. 3116. Reconsidered and reaffirmed (November 1, 1961), 68 I.D. 324, 61-2 BCA par. 3198.

<sup>20</sup> Citing Colorado Revised Statutes 1953, Vol. 5, 121-1-15(1), which reads: "Implied warranties of quality. Subject to the provisions of this article and of any statute in that behalf, there is no implied warranty or condition as to the quality of (sic) fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows: (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment, whether he be the grower or manufacturer or not, there is an implied warranty that the goods shall be reasonably fit for such purpose." Except for minor and immaterial differences, this language is identical to Section 15(1) of the Uniform Sales Act.

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\* \* \* But there is no reason to suppose that such federal common law would imply any warranties more extensive than those spelled out in the Uniform Sales Act. Hence we shall assume in the government's favor, without deciding, that the applicable law in the case at bar is the \* \* \* Uniform Sales Act \* \* \*.

The Court of Claims has both applied<sup>21</sup> and refused to apply<sup>22</sup> the provisions of the Uniform Sales Act depending upon whether, in the court's view, the underlying policy was consonant with established principles of law for the determination of controversies to which the Government is a party. The Boards of Contract Appeals have, however, on a number of occasions found both the Uniform Sales Act<sup>23</sup> and the Uniform Commercial Code<sup>24</sup> to be expressive of the federal common law.

In the case at hand the Government has predicated its claim of implied warranty under the Uniform Sales Act and the common law. The appellant has not addressed its arguments to the question of implied warranty and has not requested that any different law be applied.

Faced with a somewhat similar situation on an earlier occasion, this Board considered the applicable provisions of both the Sales Act and of the Code in reaching its decision.<sup>25</sup> We see no reason for departing from this precedent, where, as here, the same result is achieved irrespective of whether the implied warranty question is determined under the Sales Act or under the Code.<sup>26</sup>

Turning now to the question of whether the contractor impliedly warranted that it would furnish a program for the calculation of B-constants, we note at the outset that an implied warranty arises under certain circumstances by operation of law irrespective of any intention on the seller's part to create it.<sup>27</sup> The principal circum-

<sup>21</sup> *Cudahy Packing Co. v. United States*, 75 F. Supp. 239 (1948) (Section 48, i.e., timely notice of rejection provision invoked against the Government).

<sup>22</sup> *Fansteel Metallurgical Corp. v. United States*, 172 F. Supp. 268 (1959) (refusal to invoke Section 49, i.e., the unreasonable delay in giving notice of breach after acceptance of goods provision, against the Government).

<sup>23</sup> E.g., *J. R. Simplot Co.*, ASBCA No. 3952, 59-1 BCA par. 2112, modified, 59-2 BCA par. 2306 and cases cited therein. *Federal Pacific Electric Co.*, IBCA-334 (October 23, 1964), 71 I.D. 384, 1964 BCA par. 4494.

<sup>24</sup> *Productions Unlimited, Inc.*, VACAB No. 541 (March 11, 1966); *Carpenter Steel Co.*, AECBCA No. 5-65, 65-1 BCA par. 4848; *Federal Pacific Electric Co.*, supra note 23; *Goodyear Tire & Rubber Co.*, ASBCA No. 9647, 1964 BCA par. 4399; *Reeves Soundcraft Corp.*, ASBCA Nos. 9030 & 9130, 1964 BCA par. 4317; and *Noonan Construction Co.*, ASBCA No. 8320, 1963 BCA par. 3638.

<sup>25</sup> *Federal Pacific Electric Co.*, supra note 23.

<sup>26</sup> The counterpart of section 15(1) of the Sales Act is Section 2-315 of the Uniform Commercial Code which reads in pertinent part: "Implied Warranty: Fitness for Particular Purpose. Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that goods shall be fit for such purpose."

<sup>27</sup> *Interstate Folding Box Company v. Hodge Chile Co.* (No. App. 1960), 334 S.W. 2d 408 (implied warranty a creation of the law, and by the law becomes a part of the contract as much as if expressly stated therein).

stances giving rise to an implied warranty of fitness for a particular purpose are (i) the buyer must have made known to the seller, either directly or by implication, the particular purpose for which the goods are required, and (ii) the buyer must have justifiably relied upon the skill or judgment of the seller as shown by the circumstances of the particular transaction.<sup>28</sup> The Government must show that both these conditions have been satisfied.<sup>29</sup> An implied warranty of fitness does not extend, however, beyond operating conditions that the seller knew of, or should reasonably have anticipated.<sup>30</sup>

The finding, for the reasons hereinbefore stated, of an absence of contractual obligation to furnish a program for the calculation of the B-constants would not, *ipso facto*, preclude us from finding an implied warranty of fitness for a particular purpose to be present; however, the Government apparently is relying wholly upon the provisions of the invitation as including the notice to the contractor respecting the particular purpose for which the goods were procured. It has not suggested that in advance of the issuance of the invitation the appellant was informed more specifically of the purpose for which the equipment was required. There is no suggestion that, between the time the invitation was issued and the receipt of appellant's bid any conversations were held with the contractor from which the latter might reasonably have deduced that it would be expected to furnish a program for the calculation of B-constants.<sup>31</sup> The claim of implied warranty of fitness for a particular purpose must also be viewed in the light of the conduct of the parties subsequent to award of contract.<sup>32</sup> We have found that the contract provisions relied upon by the Government were too ambiguous to support an obligation on the part of the appellant derived from express language. We also conclude that they are too ambiguous to constitute adequate notice to the contractor of the particular purpose for which the goods were required. Because sufficiency of notice of purpose is a prerequisite to the existence of any implied warranty of fitness for a particular purpose, there is no need for us to consider the question of whether, in the circumstances presented, the Government relied upon the skill or judgment of the seller. The Board finds, therefore, that the appellant was not obligated, by reason of an implied warranty of fitness for a particular

<sup>28</sup> *Jean Lang Dress Co. v. Robert Hirss Co.*, 141 F. Supp. 357 (1956). Cf. modified statement of these requirements in Section 2-315 of the Code, *supra* note 26.

<sup>29</sup> *Rasmus v. A. O. Smith Corporation*, 158 F. Supp. 70 (1958). See also 46 Am. Jur. Sales, sec. 309.

<sup>30</sup> *Whiting Corporation v. Process Engineering, Inc.*, 273 F. 2d 742 (1st Cir. 1960).

<sup>31</sup> Unless an implied warranty of fitness is excluded by the language of the contract, parol evidence is admissible to show knowledge of seller of particular purpose for which buyer made purchase and to show that buyer relied upon seller's skill or judgment. *Rasmus v. A. O. Smith Corporation*, *supra* note 29.

<sup>32</sup> *Whiting Corporation v. Process Engineering, Inc.*, *supra* note 30.

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purpose, to furnish a program for the calculation of B-constants required for use with the equipment covered by the contract.

*One Set of B-Constants as a Contract Requirement*

The question of whether the appellant is contractually obligated to furnish one set of B-constants for use with the required equipment is a separate matter and admits, we think, of a different answer. Once again we are confronted with the question of the meaning to be ascribed to the provisions of Paragraph D-10 of the invitation and Item IV.B.7C(2) of the bid proposal. In addition, there is for consideration the fact that the appellant unquestionably is obligated to make operating checkout<sup>33</sup> of the system and to train<sup>34</sup> the Bureau's personnel in the art of programming the system. In ascertaining the intention of the parties with respect to the question at hand, we will follow the same guidelines as were discussed and applied in the preceding section.

The contractor in its letter of March 3, 1964, not only denied that it was obligated to furnish a program for the calculation of B-constants but also denied that it was under any obligation to furnish specific numerical values for the B-constants (one set of B-constants). The ensuing correspondence established a substantial amount of agreement between the parties. The nature and extent of this agreement is well illustrated by the Findings of Fact of July 2, 1964, in which the following passage appears:

In your letter dated April 28, 1964, you state: "The Economic Dispatch Calculation requires at any time one set of B-constants to adequately fulfill its specific function." Without a set of B-constants, the Economic Dispatch Calculation which you propose cannot, as a matter of fact, be carried out at all. \* \* \*

The appellant's position is amplified considerably in its Memorandum of Arguments. In the course of denying that "the program developed for calculating the B-constants is an essential, integral part of the economic dispatch program," the appellant admits that (i) the economic dispatch program uses numbers derived from that or a similar program; (ii) the numbers (i.e., one set of B-constants) are essential for an accurate consideration of transmission losses; and (iii) "\* \* \* without the programs, with only the numbers they generate, the equipment being furnished, together with the program being offered, will be adequate to perform the dispatch function for the

<sup>33</sup> Operating checkout of Items 1, 2 and 3 is specifically provided for in the contract schedule. The bid proposal also provides for checkout of the system and the programs.

<sup>34</sup> Paragraph D-11 of the contract's Technical Requirements, Specific requires the contractor to train up to ten of the Government's employees in the art of programming the Digital Computer System and provides that all required programming and training aids are to be supplied by the contractor. Similar provisions are contained in the bid proposal.

specified system and will constitute full compliance by General Electric of its contractual obligations."

The Government construed the quoted remarks in the preceding paragraph as a recognition by the appellant that it was obligated to furnish one set of B-constants. The Government noted, however, that the appellant had not retracted its refusal to furnish even the initial set of B-constants without being paid approximately \$2,000 in addition to the specified contract price. In view of this and also because of other statements<sup>35</sup> in the Memorandum of Arguments, incompatible with an acknowledgment of an obligation in the area in question, we shall treat the matter as still in dispute.

In denying any obligation to furnish one set of B-constants, the appellant relies on three principal grounds, viz.: (i) the appellant is furnishing the economic dispatch program required by Paragraph D-10, Item (e) of the Invitation, and it does include water optimization and transmission loss computations; (ii) the information listed as a parameter in Item IV.B.7C2 of its proposal is clearly to be provided by the user for use in the program being described, since (a) this is an "accepted trade practice" and (b) there is no precedent for claiming otherwise; and (iii) the coefficients for the B-matrix and the B-constants need not be obtained from the contractor, as the Bureau of Reclamation or any user may generate these numbers by having recourse to published references, or they may be obtained from other suppliers.

As to the first ground the appellant has offered no evidence to show in what way the economic dispatch program offered by it "includes water optimization and transmission loss computations," nor has it even undertaken to explain why it considers those matters to be included. The appellant has very clearly admitted, however, that the numbers (i.e., a single set of B-constants) are essential for an accurate consideration of transmission losses and that the Economic Dispatch Calculation requires at any time one set of B-constants to adequately fulfill its specified function. While we have found the provisions of Paragraph D-10 to be ambiguous, in so far as imposing an obligation to furnish a program for the calculation of B-constants is concerned, the appellant does not contest the fact that thereunder it was required to furnish an Economic Dispatch Program and that in connection therewith it was obligated to include water optimization and transmission loss computations. The Board concludes that the appellant is in the paradoxical position of contending that it has satisfied an admitted contractual obligation by providing means which are admit-

<sup>35</sup> E.g., " \* \* \* we know of no precedent for claiming that the B-coefficients are part of the dispatch program, much less for claiming that means to calculate the coefficients are part of the program which was offered in Item IV."

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tedly inadequate for the accomplishment of the specific function involved.<sup>36</sup>

The appellant is in no better position with respect to the second ground. It is noteworthy that the appellant does not point to any language in the bid proposal which supports its contention that the parameters in question clearly represent information to be provided by the user but rather relies upon purported precedents and an allegedly "accepted trade practice." As we have previously shown, no consideration can be given to precedents and trade practices for which no proof is offered.

The third ground appears to beg the question. The issue is not whether the Bureau of Reclamation could generate the numbers by resorting to published references or whether they could be obtained from other suppliers. Rather, the crucial question is whether the appellant is contractually obligated to furnish the numbers required (one set of B-constants) for use with the system specified. As to this question neither the appellant's conduct during performance nor the contract provisions provide support for the view that the required numbers would be provided by someone other than the appellant. From the penultimate sentence of its letter of August 13, 1963, to which we have previously referred ("I assume that actual numerical values for the loss coefficients will be supplied you \* \* \*"), it is clear that the appellant did not then consider that the numerical values in question were going to be developed by the Bureau. The quoted language is susceptible to the construction that the numerical values were to be supplied by someone other than the appellant, but being only an assumption it is also compatible with the possibility that appellant would supply them. There is nothing in the contract to indicate that anyone but the appellant would supply the numbers. This is particularly significant since the contract did contain a provision under which the contractor was required to cooperate with named contractors for associated equipment by supplying them with information considered essential for the accomplishment of their common purpose.

The Government also attacks the contractor's position on the separate ground that the contractor could not comply with its obligation to make operating checkout of the system and to train Government personnel in the programming thereof without having furnished at least one set of B-constants. This would seem to be a valid point.

The Board finds, therefore, that the furnishing of one set of B-constants for use with the system specified was required, in order for

<sup>36</sup> The notion that a particular contractual obligation can be satisfied by providing means admittedly inadequate for the accomplishment of one of its specified functions is untenable. See *Commerce International Co. v. United States*, 338 F. 2d 81 (1964) (Unless expressly negated, the duty of a contracting party to carry out its bargain reasonably and in good faith is read into all bargains).

the contractor to discharge its unquestioned obligation to (i) furnish an Economic Dispatch Program including water optimization and transmission loss computation, (ii) to make operating checkout of the system, and (iii) to train Government personnel in programming the system specified.<sup>37</sup>

*Implied Warranty of Fitness as Requiring one set of B-Constants*

Having found that the appellant is contractually obligated to furnish one set of B-constants for use with the required equipment, it is not necessary that we determine whether the appellant is also required to do so by virtue of an implied warranty of fitness for a particular purpose.

*Conclusion*

The appeal is sustained to the extent that the appellant is not required to furnish a program for the calculation of B-constants by reason of the terms of the contract or by reason of an implied warranty of fitness for a particular purpose. The appeal is denied with respect to appellant's claim concerning one set of B-constants. The appellant is contractually obligated to furnish one set of B-constants for use with the required equipment.

WILLIAM F. MCGRAW, *Member*.

WE CONCUR:

DEAN F. RATZMAN, *Chairman*.

THOMAS M. DURSTON, *Deputy Chairman*.

**KERR-McGEE OIL INDUSTRIES, INC., ET AL.**

**A-30481**

*Decided April 14, 1966*

**Oil and Gas Leases: Well Capable of Production—Words and Phrases**

The term "producing well" means substantially the same as "well capable of producing in paying quantities" which, as applied to a gas well, is a well which at the very least is capable of producing in sufficient quantity to pay the lessee a profit, though small, over operating and marketing expenses, although it may never repay the cost of drilling the well.

**Oil and Gas Leases: Production—Words and Phrases**

The term "cost of production," as used in a particular unit agreement and as applied to a gas well, includes the cost of pipe line construction and well connection which are required before the well can be produced.

<sup>37</sup> Cf. *William A. Smith Contracting Co., Inc.*, IBCA-83 (June 16, 1959), 66 I.D. 233, 59-1 BCA par. 2223 (work not expressly provided for found to be so inherent in the nature of the work described in the contract as to constitute one of those "omitted details" for which the contract incidentally provided). See also Restatement, Contracts, sec. 236 (principal apparent purpose).

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**Oil and Gas Leases: Well Capable of Production—Oil and Gas Leases: Unit and Cooperative Agreements—Outer Continental Shelf Lands Act: Oil and Gas Leases**

Under a unit agreement which defines a "producing well" as "a well capable of producing unitized substances in quantities sufficient to pay the cost of production," a gas well is not properly held to be producible where it appears that the prorated costs of connecting the well to a pipe line for production were not considered in determining the cost of production and where it appears that had this cost been considered the well would not at any time have justified the expenditure of the sum required to connect it and to bring it into production.

**APPEAL FROM THE GEOLOGICAL SURVEY**

Kerr-McGee Oil Industries, Inc., as unit operator of the Block 28 Ship Shoal Unit, on behalf of itself and Southern Natural Gas Company and Phillips Petroleum Company, a joint venture, has appealed to the Secretary of the Interior from a decision dated April 7, 1965, whereby the Director, Geological Survey, affirmed a determination of the Regional Oil and Gas Supervisor, New Orleans, Louisiana, that OCS-0345 well No. 5 was completed on September 13, 1963, as a producible gas well as defined by the unit agreement.

The record shows that lands designated as Block 29 (OCS-0345), and other blocks, Ship Shoal Area, Offshore Louisiana, were unitized, as provided under section 5 of the act of August 7, 1953, 67 Stat. 464, 43 U.S.C. § 1334 (1964), and 43 CFR, 1954 rev., 201.11 (now 43 CFR 3381.2), by virtue of the Block 28 Ship Shoal Unit Agreement dated May 25, 1956, approved by the Director, United States Geological Survey, on June 28, 1956, and designated by him as number 14-08-001-2942, and have been since that date operated as a unit. Section 8 of the unit agreement provides in part that:

Within 30 days after the first day of September next following the commencement of production of unitized substances, Unit Operator shall submit for approval by the Supervisor an application (including plats and participating schedule) to establish an initial participating area or areas to be effective such September 1 and to include those quarter-quarter-quarter blocks of unitized land, i.e., 78.125 acres, on which productive wells are completed (sub-surface location) and those which adjoin or corner such blocks. It is the intent that completion of a producible well will establish a new participating area of at least nine quarter-quarter-quarter blocks or add as hereinafter provided, at least nine quarter-quarter-quarter blocks to a participating area according to the above pattern, to the extent that such blocks are not already included in a participating area. Within 30 days after the first day of September each year thereafter in which any wells have been completed as producible wells, Unit Operator shall submit for approval by the Supervisor an application to establish in like manner any additional noncontiguous participating areas or enlarge or combine any existing participating areas, to be effective the first day of such September.



A producible well (including producible wells shut-in with the approval of the Supervisor) means a well capable of producing unitized substances in quantities sufficient to pay the cost of production.

The Supervisor shall be notified within 30 days, unless such period is extended by him, after completion of a well, of the qualifying subdivisions believed by the Unit Operator to be qualified for inclusion in a participating area.

Concurrently with the execution of the unit agreement, the same parties executed and filed with the Director a unit operating agreement dated May 25, 1965, section 7 of which provides in part that:

The Unit Operator shall not propose any expansion or contraction of the Unit Area, or any designation or revision of any participating area without the consent of the other parties hereto, as evidenced by a vote of 51% in interest of those parties hereto having interests in such participating area lease-block, or Unit Area as may be affected by the proposal; provided, however, that should one party own as much as 51% of the voting interest in the acreage affected, his vote must be supported by the affirmative vote of one additional party to bind all the parties hereto.

Paragraph 9 of the unit operating agreement provides that:

In the event of any conflict between the provisions of this Unit Operating Agreement and those of said Unit Agreement, said Unit Agreement shall govern to the extent of such conflict.

After the drilling of OCS-0345 well No. 5 by Pan American Petroleum Corporation and Kerr-McGee, the majority in interest in the participating area deemed the well nonproducible and voted by a majority of 89.38679 percent to submit an application for enlargement of the initial participating area, effective September 1, 1963, which did not include any acreage as qualified for participation by well No. 5. On September 25, 1963, Kerr-McGee, as unit operator, submitted to the oil and gas supervisor such an application for enlargement of the initial participating area. Pan American, which had 10.61321 percent interest, objected to the application on the basis that it did not include any areas as having been qualified by reason of OCS-0345 well No. 5. On October 10, 1963, Pan American instructed the operator to connect the well at its sole risk and expense by laying a 7500' flow line from OCS-0345 well No. 5 (Z-1) to OCS-0345 well No. 1 (M-1), a point from which flow could proceed through existing facilities.

By letter dated October 16, 1963, the oil and gas supervisor advised Kerr-McGee of his plans for determining the qualification of well No. 5 as a producible well by delaying any action on the application for revision of the unit participating area submitted September 25, 1963, until such time as well No. 5 should have been placed on production for a reasonable period of time and should have demonstrated capabilities to produce unitized substances in quantities sufficient to

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pay the cost of production. He further advised that he considered a reasonable period of time to be not less than 30 producing days.

On December 21, 1963, well No. 5 was placed on production to sales for the purpose of providing the oil and gas supervisor with detailed production and cost of operation data to aid him in making a determination as to the production capabilities of the well. On February 5, 1964, the operator submitted to the oil and gas supervisor some preliminary test data showing the well's production performance from December 21, 1963, through February 3, 1964, together with the operator's conclusion that additional testing of the well was warranted.

On May 12, 1964, the operator forwarded to the oil and gas supervisor production and cost of operation data, together with the operator's explanation and analysis thereof. According to that report the well was opened and produced about 700 Mcf of gas per day on December 21, 1963, after having been shut-in from the time rig work ended on September 14, 1963, until the test began. From that point forward the well rather rapidly declined to less than 500 Mcf of gas per day, from which point there was a steady decline to a maximum capability of around 200 Mcf per day.<sup>1</sup>

The operator's records of revenue and operating expense from December 21, 1963, through March 1964, excluding the amount of \$67,-404.69<sup>2</sup> reported as well connection costs, show the following:

<i>Period</i>	<i>Revenue</i>	<i>Expense</i>	<i>Profit</i>	<i>Cumulative Profit</i>
December 1963-----	\$1, 097. 30	\$524. 48	\$572. 82	\$572. 82
January 1964-----	3, 427. 76	3, 041. 01	386. 75	959. 57
February 1964-----	2, 333. 54	2, 043. 88	289. 66	1, 249. 03
March 1964-----	1, 813. 52	2, 422. 95	(609. 43)	639. 80

By letter dated June 24, 1964, the oil and gas supervisor notified the operator that "it is determined that the well was not completed as a producible well as defined by the terms of the unit agreement prior to midnight August 31, 1963." He, however, also determined that:

On September 10, 1963, a potential test of well No. 5 was witnessed by a representative of this office with the following results: Perforations 14,646-657' and 14,661-674' tested 760 MCF/D, 30 BC/D, FTP 302 psi, 20/64" choke. The well completion report on Form 9-151 submitted to this office by the operator on

<sup>1</sup> The operator's records show a net operating loss each month after March 1964 through March 1965, and, in its appeal to the Secretary, the operator states that the well has continued to decline in productive capability to the point that during April 1965 it averaged only 57 Mcf of gas per day with practically no condensate.

<sup>2</sup> The cost of connecting the well to the gas pipe line was initially reported to be \$47,342.62. In its appeal to the Secretary the appellant explains that the cost has been adjusted for late charges and to include the cost of a separator-dehydrator platform which had been incorrectly classified. The amount does not appear to be in controversy.

October 18, 1963, shows that well No. 5 was completed on September 13, 1963. The well history attached to the completion report shows that on September 13, 1963, well No. 5 was tested for 13 hours and flowed at the rate of 620 MCF/D, 23.5 BC/D, FTP 1,200 psi, open choke.

All available production and cost of operation data indicate that the actual additional cost of producing well No. 5, in excess of the total cost of producing all other wells in the unit area, will not exceed and is likely to be less than the revenue attributable to production which the well is capable of producing. It is considered to be in the interest of conservation to encourage the retention of wells capable of paying the cost of production. Accordingly, it is determined that well No. 5 was completed on September 13, 1963, as a producible gas well as defined by the unit agreement. The completion of the well qualifies for participation eight (8) additional quarter-quarter-quarter blocks described as follows:

\* \* \* \* \*

[Description of tracts]

The above subdivisions, together with any other subdivisions qualifying during the unit year, should be included in an application for revision of the participating area and filed with this office for approval within 30 days after September 1, 1964.

In affirming the conclusions of the oil and gas supervisor, the Director, Geological Survey, stated that:

The Supervisor's determination was based on his analysis of production, income and cost of production data on well No. 5 for the period December 21, 1963, through May 11, 1964.

\* \* \* \* \*

An examination of the production, income and cost of production data on well No. 5 suggests that this well is probably a noncommercial gas well with reserves insufficient to repay the costs of drilling, equipping and connecting the well but a well which for at least 60 days produced in quantities sufficient to pay the costs of production attributed to it. It would appear that such a well must be determined to be a "producible well" under the stated definition of this term in Section 8 of the unit agreement.

\* \* \* While the Supervisor stated in his letter of June 24, 1964, that: "It is considered to be in the interest of conservation to encourage the retention of wells capable of paying the cost of production," his determination was based on an analysis of the production, income and cost of production data on well No. 5, and his interpretation of the requirements of Section 8 of the unit agreement. It therefore appears that the conservation aspect of the Supervisor's determination, was not the controlling consideration.

\* \* \* The Supervisor's interpretation of Section 8 of the unit agreement is that the September 1 date mentioned in Section 8 as the effective date of the annual revision of the participating area has no bearing on the period used to determine if a well is "producible" under the terms of Section 8. The Supervisor's interpretation in this regard appears reasonable.

In its appeal to the Secretary the operator contends in substance that:

(1) The Director erred as a matter of law (a) in failing to take into account the well connection costs of \$67,404.69 as an expense and

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(b) in ruling, under the circumstances, that production in excess of current expenses for a period of approximately 60 days was determinative that the well was producible;

(2) It is not within the interest of conservation and is contrary to the basic purpose for which unitization is permitted to encourage the completion and connection of wells with production capabilities similar to the OCS-0345 well No. 5 by the inclusion of the same in participating areas;

(3) The oil and gas supervisor erred in determining on June 24, 1964, that well No. 5 qualifies the designated additional quarter-quarter-quarter blocks for inclusion in revision of the initial participating area as of September 1, 1964;

(4) The matter for decision is principally private and judicial in nature, and the pecuniary interest of the United States is not affected one way or the other by the outcome of the dispute except for reduction in delay rentals if the decision of the supervisor is sustained.

Pan American, on the other hand, contends that:

(1) The definition of "producible well" is clear and unambiguous in the unit agreement and is not subject to interpretation;

(2) The appellant's figures show that the well was completed and produced unitized substances in quantities sufficient to pay the cost of production;

(3) Expenditure for connection of the well is not an operating expense; the unit agreement does not require that a well be produced in order to qualify as a producible well, but only that it be completed capable of production under the definition;

(4) The supervisor advised the unit operator that he considered a reasonable period of time to be not less than 30 producing days. The well produced well beyond the 30 days thought reasonable;

(5) The procedure followed in the supervisor's determination was in compliance with normal procedure used consistently in the operation of the unit;

(6) Other wells were reported within 30 days after completion as producible; OCS-0347 well No. 1, completed May 5, 1962, and included in the participating area September 1, 1962, has never been connected.

It would appear, as the appellant contends, that the controversy here is primarily a private one between the disputing parties and that the interests of the United States will not be materially affected by its outcome. However, the unit agreement provides for the oil and gas supervisor to make the final determination, after notification by the unit operator, as to which subdivisions are to be included in a participating area. Incidental to making this determination he must also

determine what wells are producible within the meaning of the agreement. Thus, the oil and gas supervisor is not without authority to make the determination necessary here and, indeed, is required to, at least for the purposes of the United States as lessor.

The precise question presented in this appeal is not one for which a great deal of authority may be found. The appellant has cited numerous court decisions interpreting lease provisions pertaining to the production of oil or gas in "paying quantities" which, it asserts, support its contention that the well in question was not completed as a "producible well." Pan American, on the other hand, has attempted to distinguish these cases from the present case upon their facts, but it has not cited any judicial authority in support of the construction which it seeks.

The term "producible well" seems not to have made its way yet into the language of the courts. This Department, however, has stated that the terms "producible" and "capable of producing" are virtually synonymous. Solicitor's opinion, 70 I.D. 82, 85 (1963).

The courts have generally held that the terms "produced" and "produced in paying quantities" mean substantially the same thing. *Whitaker v. Texaco Inc.*, 283 F. 2d 169, 175 (10th Cir. 1960); *Archer v. Skelly Oil Company*, 314 S.W. 2d 655, 662 (Tex. Civ. App. 1958); *Clifton v. Koontz*, 325 S.W. 2d 684, 690 (Tex. Sup. Ct. 1959); *contra*, see *Thornton, Oil and Gas* § 236 (5th Ed., 1932), and cases cited in *Denker v. Mid-Continent Petroleum Corporation*, 56 F. 2d 725, 727 (10th Cir. 1932). They have further held that the words "paying quantities," as applied to a gas lease, mean that the gas discovered must be sufficient in quantity to pay the lessee a profit, though small, over operating and marketing expenses, although it may never repay the cost of drilling the well. *Denker v. Mid-Continent Petroleum Corporation*, *supra*; *Hanks v. Magnolia Petroleum Co.*, 24 S.W. 2d 5 (Tex. Comm. App. 1930); *Clifton v. Koontz*, *supra*.

In the case of *Archer v. Skelly Oil Company*, *supra*, one of the cases relied upon by the appellant, the court quoted the following language from *Hanks v. Magnolia Petroleum Co.*, *supra*:

What might be determined to be gas in paying quantities in one well would not be so considered in another located in a different territory. A well producing much less gas than the one drilled by plaintiff in error might be in paying quantities because of existing pipe line facilities furnishing a means of marketing the gas at a profit above the cost of operating the well. On the other hand, a well producing a large amount of gas drilled in territory remote from any market and without pipe line facilities might not be in paying quantities, unless it was shown that the amount of gas produced was sufficient to justify the construction of transportation facilities and the marketing of such gas would yield a return over and above the expense of providing the same. 24 S.W. 2d at 6.

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The court then stated that :

The language just quoted by Judge Leddy indicates to this writer that the expense of pipe line facilities is part of the operating and marketing expense he had reference to in saying "the gas discovered must be sufficient to pay the lessee a profit, though small, over operating and marketing expenses." 314 S.W. 2d at 663.

Although, as the appellant asserts, it does not appear that this ruling has been overruled or criticized, subsequent treatment of the case leaves the foregoing statement as dictum as to that case. See *Skelly Oil Company v. Archer*, 317 S.W. 2d 47 (Tex. Sup. Ct. 1958); 334 S.W. 2d 855 (Tex. Civ. App. 1960); 356 S.W. 2d 774 (Tex. Sup. Ct. 1962). There is, however, other authority which would seem to support the same conclusion. See, e.g., *Humphrey v. Placid Oil Company*, 142 F. Supp. 246 (E.D. Tex. 1956), *aff'd*, *Placid Oil Company v. Humphrey*, 244 F. 2d 184 (5th Cir. 1957); *Whitaker v. Texaco Inc.*, *supra*.

The one case most nearly similar in its facts to the present case is *Slats Honeymon Drilling Co. v. Union Oil Co. of Cal.*, 239 F. Supp. 585 (W.D. Okla. 1965). That case involved an action brought by a well operator upon a dry hole contribution agreement between the operator and the oil company. Pursuant to the agreement the plaintiff drilled a well which was commenced on March 3, 1961, and completed on May 9, 1961. The court found that the well was drilled as a wildcat to the Manning formation at about 8762-8792 feet and was drill-stem tested, showing approximately 730 Mcf of gas. The well was then drilled down to the Mississippi Lime at approximately 9,280 feet and tested without show. The operator then backed up to the Manning formation, perforated, sand-fractured and acidized the formation and had a showing of approximately 965 Mcf of gas. For 16 days gas from the formation was vented and certain tests were made and the well cleaned out. Approximately 11,000 Mcf of gas was so vented. Tests to improve the well were authorized, and it appeared that the well would produce approximately 700 to 800 Mcf of gas per day. At the time the nearest pipe line was 6 miles to the east, and another pipe line was located 7 miles to the south. The operator attempted, unsuccessfully, to obtain action on the part of the owner of the nearest pipe line to extend its line to the well. Studies were also made by the plaintiff with reference to laying its own pipe line at its own expense to the nearest line, and it was found to require an outlay of approximately \$36,000. On August 21, 1962, the plaintiff notified the defendant that it had decided to plug and abandon the subject well as a dry hole and made request for the payment of the stipulated dry hole money from the defendant. The well was thereafter plugged.

The plaintiff contended, in brief, that the well was a dry hole within the meaning of the agreement even though it was capable of producing some gas but which was not reasonably marketable. The defendant, on the other hand, contended that the well was not a dry hole within the meaning of the agreement inasmuch as it was capable of producing some gas, and the plaintiff was not warranted in failing to expend the additional sum of \$36,000 to build its own pipe line and connect the well to the nearest pipe line and thus provide the necessary transportation facilities to provide a market for the gas that could be produced from the well.

The court stated that:

With reference to whether or not the well is to be considered a dry hole under said agreement, the Court is faced with a lack of pertinent authorities in this precise area. The closest case \* \* \*, while not directly in point, would appear to recognize that a dry hole is one not capable of producing oil or gas in paying quantities. An analogy to the proposition here involved would be the matter of the extension of a lease past the primary term by a well which must be in production. The courts almost all hold that such a well must produce in paying quantities and if it does not then the well is considered a dry hole. \* \* \* It would appear to be the best approach to this proposition for the courts to consider each situation on its own facts. In view of the evidence here as above outlined, the Court is of the opinion and so holds that this well must be considered to be a dry hole within the meaning of that language as used in the agreement of the parties. Nothing to the contrary has been shown to the Court as usage in the oil and gas industry. It appears to be the rule under the cases that transportation facilities for *gas* are a definite factor in determining whether or not a *gas well* may be considered to be a producer in paying quantities.

\* \* \* \* \*

Thus, the Court finds that this well was a dry hole under said agreement notwithstanding its ability to produce some gas inasmuch as under the circumstances here present the gas was not reasonably marketable, could produce no income to the parties, in fact never produced any income to the parties, and such well must therefore be deemed to be one not capable of producing oil or gas in paying quantities and a dry hole. 239 F. Supp. at 588.

Viewing the authorities as a whole, it seems clear that the term "producible well," without modification, means substantially the same thing as a "well capable of producing in paying quantities" and that the determination as to whether or not a gas well is capable of producing in paying quantities must necessarily depend upon whether the amount of gas produced is sufficient to justify the construction of transportation facilities and the marketing of such gas would yield a return over and above the expense of providing the same.<sup>3</sup>

<sup>3</sup> In *Humphrey v. Placid Oil Company*, *supra*, the court went so far as to state, in ruling upon a dry hole agreement, that:

"Considering the objects of the dry hole letter, both from the standpoint of the plaintiffs and from the standpoint of the defendant, I am of the opinion and so conclude that 'paying

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There is little doubt that under the foregoing criteria the well in question would properly be held to be a "dry hole" and not a "well capable of producing in paying quantities." But we are not dealing here with the question of the meaning of the term "producing well" as it might occur without further definition. Rather, we are dealing with an agreement which specifically defines a "producing well" as "a well capable of producing unitized substances in quantities sufficient to pay the cost of production." It is therefore necessary to determine whether or not this definition warrants a different conclusion from that which might otherwise be reached.

quantities' as used in the dry hole letter agreement in question means such quantities of oil or gas that an ordinarily prudent person experienced in oil or gas production, would, taking into consideration the circumstances and conditions then existing, expect a reasonable profit over and above the cost of drilling, equipping and operating the well. \* \* \*

142 F. Supp. at 255.

In holding that the cost of drilling should also be considered in determining whether or not a well produced in paying quantities, the court seemingly contradicted the great weight of authority on the question. After apparently committing itself to that position, however, the court added that:

"Whether in defining the term 'paying quantities' as used in the dry hole letter the element of cost of drilling or development should be included or whether only cost of production should be considered is not too material to the decision of this case. \* \* \*"

The definition of "paying quantities" as not including a return sufficient to cover the cost of drilling is applied to situations where the lessee or operator who has made a substantial investment would be faced with considerable loss if his right to keep an interest in the lease (i.e., by having its term extended) depended upon the well's returning its full economic cost, including the cost of drilling.

The court in the *Whitaker* case, *supra*, carefully pointed out that in other circumstances "paying quantities" could have a different meaning:

"The term 'paying quantities' as used in oil and gas leases has a different meaning when applied to a habendum clause than it has when applied to express or implied covenants to drill additional or off-set wells. This difference has been long recognized in Oklahoma. The obligation to drill additional wells or off-set wells is quite commonly dependent upon the production of oil and gas in paying quantities in a previously drilled well or in a well so situated with relation to leased premises that production may drain the leased premises. In such situations the term 'paying quantities' is taken to mean such quantities as would lead a reasonably prudent operator to drill the additional or off-set well with the expectation of recovering from production the cost of drilling, equipping, and operating well plus a reasonable profit."

"When the term 'paying quantities' is used in connection with the continuation of a lease under a 'thereafter' clause, a different meaning is given. The Oklahoma rule is that when used in a habendum clause the term means paying quantities to the lessee and that 'if the well pays a profit even though small, over operating expenses, it produces in paying quantities, though it may never repay its costs, and the operation as a whole may prove unprofitable.' The reason for the distinction is obvious. A party should not be obligated to drill a well unless there is a reasonable expectation of recoupment of investment with a profit for the venture. Once a well is drilled reasonable opportunity should be afforded to recover the sums risked." 283 F. 2d at 175, 176.

We need not decide here whether the broader or narrower standard should be applied, since we conclude for the purposes of this case that at least the direct costs of operation need be recouped, an element that is required under either standard. We note, however, that a person drilling a non-participating well is not in the same position as one who needs production to gain a lease extension and thereby protect his investment. Even if he cannot join the participating area, he will ordinarily be free to obtain what revenue he can from his well. (See 30 CFR 226.12, "Form of Unit Agreement for unproved areas," paragraph 13, at page 299.) Thus the reasons justifying the narrower definition of "paying quantities" in a habendum clause for the purpose of lease extension do not apply to the expansion of a participating area.



It is at once apparent that this definition differs from the usual definition of a well "capable of producing in paying quantities" in that the courts have held that such a well must provide at least a small profit above the cost of production, while the agreement in this case provides only that the well must produce in quantities sufficient to meet the cost of production. The definition in the agreement seems clearly to exclude the element of profit as an item which must be covered by returns from the well. However, we see no basis for finding that the agreement alters what seems to be the accepted rule that in determining whether a gas well is capable of producing, the cost of making the gas marketable must be considered as an element in the cost of production.

The reason for this rule seems apparent. Until a well is completed there is no way of knowing whether the well will produce enough oil or gas to make the drilling of it worthwhile or whether it will produce anything at all. When oil or gas is discovered, however, in any quantity which will net a return over the cost of production, it is worthwhile to produce the well, even though it is apparent that it will never repay the drilling cost, because any return over operating costs will mitigate the loss on the drilling operation. But where, after gas has been found in such quantities, it is necessary to construct additional facilities to make the gas marketable, the construction of such facilities cannot be justified unless it appears that the well is capable of repaying at least the cost of such construction. Otherwise, producing the well would merely increase the loss already sustained in the drilling of the well. See *Whitaker v. Texaco, Inc.*, *supra*, at 175; *Humphrey v. Placid Oil Company*, *supra*, at 255.

The next issue, then, is to determine how much of the marketing cost is to be assessed to any month. In its brief the appellant attributes the entire cost of connecting well No. 5 to the first month of production and carries it forward in the total deficit. It does, however, recognize that some items of cost, including marketing facilities, workovers and other major repairs should be amortized and the salvage value, if any, deducted. Granting all this, it asserts that the costs of production have exceeded income. Pan American has offered no rebuttal to these contentions. It is interesting to note, however, that it itself estimated that additional expenditures of \$75,000 would be necessary to equip well No. 5 for production and that it thought that this cost would be paid out in approximately 18 months by revenue received in excess of operating costs, or at the rate of \$4,000 per month

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approximately.<sup>4</sup> However, on the basis of the data for revenues and operating expenses for the period December 1963 through March 1964, set forth earlier, even a monthly charge of \$1,000 for marketing costs would wipe any possibility that the revenue would equal costs.

We may now examine at what point it is to be determined whether or not a well is producible or whether it is capable of producing in sufficient quantity to justify additional expenditures to connect it to a pipe line and to make it produce. It is clear from the agreement in question, as well as from the procedure that the record shows to have been followed in the case of other wells drilled under the same agreement, that this determination is normally made after the drilling of the well has been completed and after the well has been tested but before actual production for market has commenced. At such time, of course, there is a possibility that a well which appears to have every potentiality of becoming a profitable well may not fulfill its expectations and may never repay the cost of connecting it to the pipe line for production. But under the terms of the agreement it is incumbent upon the operator to make that determination within 30 days after completion of a well, unless the period is extended by the oil and gas supervisor, and to notify the supervisor of such determination. Ordinarily, it would appear, the determination is made by the operator, and the operator's determination is accepted by the other parties.

In all of the cases cited which have most nearly dealt with the same problem, *i.e.*, *Hanks v. Magnolia Petroleum Co.*, *Humphrey v. Placid Oil Company*, and *Slats Honeymon Drilling Co. v. Union Oil Co. of Cal.*, the wells in dispute were not connected to a pipe line and were not made to produce, whereas in the present case the well was connected and gas was produced. As we have already noted, the *Slats Honeymon* case was most similar in its facts to the present case. In both cases the test capacities of the wells were approximately equal. The well connection costs were comparable, and, in both cases, the operators concluded, after completion of the drilling and tests, that the anticipated production from the wells did not warrant the expenditure of the additional sum required to connect the wells and bring them into production. Here the similarity ends. In the first case, the oil company did not offer to pay the cost of constructing the necessary pipe line and, apparently, did not disagree with the operator's determination that the well would not repay the cost of such construction. The well was not connected, did not produce, and no gas from it

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<sup>4</sup> Letter, District Supervisor E. M. Delany, Pan American, to Geological Survey, Attention: Mr. A. D. Acuff, dated October 4, 1963 (Exhibit B, Pan American brief in answer to appeal to Secretary).

was sold. In the present case, however, Pan American apparently believed that the well could be made productive, contrary to the opinions of the unit operator and the other parties to the unit agreement, and it offered to assume the expense of connecting the well. The well was connected pursuant to Pan American's instruction, and it has produced gas and has brought in some revenue.

In these circumstances, where the operator and Pan American did not agree upon the potentiality of the well, the test imposed by the oil and gas supervisor for determining the producibility of the well would appear to be a reasonable one if, in determining the cost of production, the cost of connecting the well were considered. If, after well connection costs were considered, the well, for 60 days, produced gas in sufficient quantity to indicate that it was capable of meeting production costs, it would have been properly found to be a producible well, even though it failed, after that period, to continue to produce in such quantity.

There is nothing in the record, however, to indicate that the well connection costs were included in determining the cost of production or that, if the connection costs were to be considered, the available evidence would at any time have justified a reasonable and prudent operator in expending the necessary sums to make the well producible.<sup>5</sup> On the contrary, the evidence contained in the record, as well as the findings of the Geological Survey, substantiate the appellant's argument that under the criteria accepted by courts in similar cases, OCS-0345 well No. 5 was completed as a "dry hole," and we are unable to concur in the finding that it was completed as a "producible well" within the meaning of the unit agreement. In short, we conclude that "cost of production," as used in the definition of "producible well" in section 8 of the unit agreement, includes the cost of connecting the well for the purpose of producing the well for market.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A (4) (a) ; 24 F.R. 1348), the decision appealed from is reversed.

EDWARD WEINBERG,  
*Deputy Solicitor.*

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<sup>5</sup> The fact that on February 5, 1964, after the well had been connected, the operator recommended to the oil and gas supervisor that additional testing be conducted cannot reasonably be construed as evidence that the operator then, or at any other time, believed that the well was worth connecting. See *Slats Honeyman Drilling Co. v. Union Oil Co. of Cal.*, *supra*, at 588, 590.

**LEO J. KOTTAS**  
**EARL LUTZENHISER**

A-30554

*Decided April 19, 1966***Mining Claims: Determination of Validity**

No hearing is necessary to declare mining claims void *ab initio* where the records of the Department show that at the time of location of the claims the land was not open to such location.

**Mining Claims: Lands Subject to—Small Tract Act: Classification**

Land which has been classified as suitable for disposition under the Small Tract Act is not open to location under the mining laws.

**Mining Claims: Mineral Lands—Small Tract Act: Classification**

The Secretary of the Interior is not precluded from classifying land as chiefly valuable for small tract purposes solely because it is known to contain minerals, and, where such land is so classified, he is under no obligation to issue regulations providing for mineral location of mineral deposits reserved from disposition under the Small Tract Act.

**Public Lands: Generally—Surveys of Public Lands: Generally**

A description of public land is legally sufficient if the land is adequately and accurately identified in accordance with the public land survey system, even though the county in which the land is situated is incorrectly designated.

**Public Lands: Classification—Rules of Practice: Hearings**

An applicant for or claimant of public land is not entitled as a matter of right to a hearing for determining the proper classification of land to which he seeks title.

**Small Tract Act: Classification**

A classification of public land as suitable for disposal under the Small Tract Act will not be disturbed in the absence of substantial positive evidence that the classification is erroneous.

**Rules of Practice: Hearings**

A request for hearing will be denied where no facts are alleged which, if proved, would warrant the granting of the relief sought.

**Applications and Entries: Relinquishment—Mining Claims: Generally**

A relinquishment of a claim to land that is secured through misrepresentation, fraud or deceit is void, but a relinquishment given simply to avoid facing adverse proceedings by the Bureau of Land Management will be regarded as having been voluntarily executed, and its effect will not be nullified.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Leo J. Kottas and Earl Lutzenhiser have appealed to the Secretary of the Interior from a decision dated September 10, 1965, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed a decision of the Montana land office declaring the Gold Seal

and Gold Seal No. 1 placer mining claims null and void *ab initio* as to portions of the claims lying within the SE $\frac{1}{4}$ SE $\frac{1}{4}$  sec. 14, T. 9 N., R. 3 W., M.P.M., Montana.

The record indicates that the appellants located the Gold Seal claim on July 21, 1963, and the Gold Seal No. 1 claim on September 21, 1963. Prior thereto, the SE $\frac{1}{4}$ SE $\frac{1}{4}$  sec. 14 was classified as suitable for transfer under the Small Tract Act of June 1, 1938, 52 Stat. 609, as amended, 43 U.S.C. § 682a (1964), by Classification Order No. 503 of September 29, 1961 (26 F. R. 9387, October 5, 1961).<sup>1</sup> At the time of publication of the classification order, ten acres in the S $\frac{1}{2}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$  and the S $\frac{1}{2}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$  sec. 14 were included in small tract leases Montana 031202 and Montana 031401, issued effective September 17, 1958, and October 6, 1958, to John H. Wildish and to James D. Wildish, respectively. The lands embraced in the small tract leases were also included in three mining claims for which patent application was filed by John Wildish and which were declared null and void by a decision of the land office dated September 12, 1961. The record further indicates that a portion of the area covered by the appellants' claims was embraced in the Gold Bond placer mining claim, located by Charles E. Mark on September 26, 1961, and relinquished by him on November 2, 1961. Mark allegedly sold his rights to the claim to appellant Earl Lutzenhiser in the spring of 1963. By notice dated December 2, 1963, the appellants were advised that their mining claims and partially completed frame building were considered to be in trespass "on land segregated by Classification Order No. 503, published in the Federal Register on October 5, 1963 [sic]." By a decision of the land office dated March 3, 1964, the appellants' mining claims were declared null and void for the reason that land office records showed that the lands embraced by the claims were not open to mineral entry at the time of their location.

In appealing to the Director, Bureau of Land Management, the appellants contended that:

(1) The notices of trespass were legally insufficient and without basis in law for the reason that the notices showed on their face that publication of the classification order in the Federal Register was after the date of location of the claims;

<sup>1</sup>The order, signed by the Chief, Division of Lands and Minerals Management, Montana State Office, provided in part that:

"\* \* \* I hereby classify the following described public lands, totaling 40 acres in Lewis and Clark County, Montana, as suitable for transfer under the Small Tract Act \* \* \*

PRINCIPAL MERIDIAN MONTANA

T. 9 N., R. 3 W.,

Sec. 14, SE $\frac{1}{4}$ SE $\frac{1}{4}$

\* \* \* \* \*

"2. Classification of the above-described lands by this order segregates them from all appropriation, including locations under the mining laws." \* \* \*

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(2) Classification Order No. 503 was not recorded or placed upon the public records as required by law;

(3) The classification order specifically withdrew lands in Lewis and Clark County, whereas the appellants' claims are in Jefferson County;

(4) The appellants' claims are not entirely upon lands which the Bureau of Land Management attempted to withdraw from mineral entry;

(5) The attempt to classify the land for small tracts is void *ab initio* for the reason that the land in the claims is chiefly valuable for minerals rather than for small tracts;

(6) The attempted segregation of the land from mining location is contrary to the laws of the United States;

(7) The withdrawal was void because it was not made by the Secretary of the Interior;

(8) The appellants were deprived of their property without due process of law inasmuch as they were not granted a hearing on any of the issues;

(9) The appellants acquired all of the rights in the mining claim of Charles E. Mark who was in continuous possession prior to issuance of the classification order;

(10) The purported relinquishment of Mark to the United States was null and void for the reasons that no power was conferred upon the Bureau employee who obtained the relinquishment, that no consideration was given for it, that promises were given to Mark that he would be given a lease, which promises were not kept, that Mark did not voluntarily execute the relinquishment but was under duress, having been informed that he was violating the 1955 mining laws and that legal proceedings would be taken against him by the Government, and that the relinquishment was not signed by Mark's wife as required by Montana law.

The appellants filed with their appeal an affidavit dated April 22, 1964, in which Mark alleged that the relinquishment had been secured from him by deceit and misrepresentation and that had he known the true facts he would not have relinquished his claim.

The Office of Appeals and Hearings held that the land in question is public land of the United States, that the Department of the Interior has plenary authority over the administration of such public land, that the Secretary is charged with seeing that the Department's authority is rightly exercised to the end that valid mineral claims are recognized and invalid claims are eliminated, and that there can be no right of possession of a mining claim on public land which is not based on a valid location. It found that Classification Order No. 503 was

issued under a proper delegation of authority from the Secretary of the Interior, that it was not void or illegal because it was not made by the Secretary himself, that the order properly identified the affected land by legal subdivision, section, and township, that the designation of the county in which the land was purportedly situated was for administrative expediency only, and that the incorrect designation of Lewis and Clark County, rather than Jefferson County, did not invalidate the classification order. The Office of Appeals and Hearings further held that publication of notice in the Federal Register is sufficient notice to the public of the classification of land for small tract purposes and of its segregation from appropriation under the mining laws, that the appellants were charged with constructive notice of the classification order, and that there was no requirement that the order be recorded in Jefferson County, Montana, in order to be effective. With respect to the appellants' claim of succession to the rights of Charles E. Mark, the Office of Appeals and Hearings found that, despite the affidavit of Mark, the record showed that Mark relinquished the claim of his own free will, that the relinquishment was recorded in the Jefferson County courthouse on November 2, 1961, that the relinquishment was accepted by the Bureau of Land Management by a formal decision of the Montana State Office on November 24, 1961, without objection or protest by Mark, and that Mark's wife was not required to join in the relinquishment of the claim. It concluded that the purported locations of the Gold Seal and Gold Seal No. 1 claims in 1963 were null and void *ab initio* for the reason that the lands embraced therein were segregated from location at that time and that a hearing is not required to determine the validity of a mining claim when the records of the Department show that the land embraced therein was not open to mining location at the time of the attempted location.

In their appeal to the Secretary the appellants contend, *inter alia*, that:

(1) No part of the appellants' claims extends into the small tract leases of John and James Wildish;

(2) The appellants were not parties to the rejection of the mineral patent application of John Wildish;

(3) The Secretary of the Interior has no authority under the Small Tract Act even to attempt to classify lands which are valuable for minerals as nonmineral and to withdraw them from mining location;

(4) The Gold Seal claim extends beyond the 40-acre tract classified for small tract purposes, and it was error to hold the claim invalid, even if the classification were valid;

(5) The appellants were denied the opportunity to appear at a hearing at which they could (a) prove the true facts with respect to

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the location and validity of their claims, (b) show that duress and threat of prosecution were used in securing the relinquishment of Mark, and (c) prove that the chief value of the lands is for minerals.

The appellants have also reiterated their previous challenge of the validity and effectiveness of the small tract classification order.

Initially, it should be pointed out that the Bureau's decisions pertained only to the parts of the appellants' claims situated within the SE $\frac{1}{4}$ /SE $\frac{1}{4}$  sec. 14, T. 9 N., R. 3 W. The Bureau did not purport to determine the validity of any part of the appellants' claims extending beyond the area classified as suitable for small tract purposes or to determine what, if any, part of the claims was, in fact, situated outside of that area. Moreover, in view of the conclusions to be reached hereafter, it is unnecessary to determine whether or not the appellants' claims extend into the area covered by the small tract leases issued to the Wildishes, and the rejection of the patent applications of John Wildish is immaterial to the determination of the validity of the appellants' claims.

The appellants' argument, reduced to its basic premise, is that Classification Order No. 503 was wholly ineffective to segregate the land in question from mining location and that the locations of the appellants' claims in 1963 were valid or that, even if the classification order did remove the land from operation of the mining laws, the appellants succeeded to the rights of Charles E. Mark, who made a valid location prior to the small tract classification, and that the appellants' claims were prior in time to and excepted from the effects of the classification order.

Considering first the rights of the appellants based upon the 1963 locations, the effect of a small tract classification in closing the lands classified to subsequent mining location has been settled beyond reasonable question. 43 CFR 2233.2(b); *The Dredge Corporation v. Penny*, Civil No. 475, D. Nev., May 18, 1964, appeal docketed, No. 19964, 9th Cir.; *Las Vegas Sand and Gravel Co., Inc.*, 67 I.D. 259 (1960); *Harry E. Nichols*, 68 I.D. 39 (1961); *J. R. Henderson*, A-28652 (July 18, 1961); *Frank Melluzzo et al.*, 72 I.D. 21 (1965). In the *Melluzzo* case the Department held that even if the land has not been classified for small tract purposes at the time of a mining location, but a small tract application has been filed, and thereafter the land is classified as chiefly valuable for small tract purposes, the classification relates back to the time of filing of the small tract application, and the subsequent mineral location becomes invalid upon the allowance of the small tract application. These same decisions make it abundantly clear that in such circumstances a hearing is not required to determine the validity of a mining claim, but the claim is properly



declared null and void where the Department's records show that the land was not open to mining location at the time of the purported entry. This is for the simple reason that a claimant cannot possibly produce evidence to prove the validity of a claim upon land that was not open to mineral entry at the time of the attempted location.

Contrary to the appellants' apparent understanding, the classification of land as chiefly valuable for small tract purposes does not necessarily require a finding that the land is nonmineral in character, and a finding that land is mineral in character does not preclude the classification of such land as "chiefly valuable for small tract purposes." As the court said in *The Dredge Corporation v. Penny, supra*:

A study of the Small Tract Act \* \* \* shows \* \* \* clearly that Congress did not forbid the Secretary of the Interior from classifying mineral land for small tract purposes \* \* \*. The only express limitation on the Secretary's broad discretion are but that the sale or lease contemplated under the Act may not interfere "with the use of water for grazing purposes nor unduly impair the protection of watershed areas." At the time this Act was passed, prospecting for minerals and the practice of locating claims pursuant to the mining laws were as prevalent as raising cattle and conserving water. If Congress felt that mineral land should not be subject to classification under the Small Tract Act, it would have so stated. The Act does not prevent the Secretary from classifying mineral land as small tract land.

Section 2 of the Small Tract Act, 68 Stat. 239 (1954), 43 U.S.C. § 682b (1964), specifically provides that patents issued under the act "shall contain a reservation to the United States of the oil, gas, and all other mineral deposits, together with the right to prospect for, mine, and remove the same under applicable law and such regulations as the Secretary may prescribe." Thus, Congress clearly contemplated that some mineral lands might be found to be chiefly valuable for small tract purposes, and it granted the Secretary authority to make that determination. But while the act may empower the Secretary to prescribe regulations for the disposition of minerals in such lands, such regulations have not been issued and are not required to be issued, and, in the absence of such regulations, the locatable minerals in lands so classified remain closed to mining location. *The Dredge Corporation v. Penny, supra*; *Frank Mellizzo et al., supra*.

The Department has long held that a hearing is not required before land can be classified for a particular purpose. *Paul B. and Ruth M. Butler*, A-27634 (August 26, 1958), and cases cited. This is especially true where, as here, the classification of the land was made more than two years before the attempted mining location. See *The Dredge Corporation v. Penny, supra*. Congress has committed to the Secretary of the Interior the responsibility for determining the best use to be made of the public lands. This determination necessarily requires reliance on the judgment of individuals, and reasonable minds

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can, and often do, differ in opinion as to what is the best use for a particular tract of land, but, where land has been classified as suitable for disposal under a specific act for a specific purpose, the classification will not be disturbed in the absence of substantial positive evidence that the classification is erroneous. The appellants have submitted no such evidence,<sup>2</sup> but, even if they were to show to the satisfaction of the Department that the lands should not be classified as suitable for small tract disposition, a reclassification of the land would not, in any event, operate retroactively to validate their mining claims as of the dates on which they were located. *J. R. Henderson, supra*, and cases cited.

The appellants challenge the Bureau's finding that the designation of the wrong county in the classification order did not nullify that order as notice to the public of the classification, asserting that "no court authorities are cited to support such erroneous conclusion." They, interestingly, do not cite any authority whatsoever in support of a different conclusion. We think, however, that it is clearly established that there is no requirement that the name of the county in which land is located be given if the land is otherwise adequately identified. The land was, in this case, fully identified by township, range, section and legal subdivision. There were no ambiguities in the description, and there was no possibility that the land could be confused with another tract of land. There is only one SE $\frac{1}{4}$ SE $\frac{1}{4}$  sec. 14, T. 9 N., R. 3 W., M.P.M., in whatever county or other administrative district it may happen to be situated. The fact that a part of a description of land is incorrect will not render the description insufficient if the remainder of the description sufficiently identifies the land. See 23 Am. Jur. 2d, Deeds § § 222, 223 and 226. Accordingly, I concur in the Bureau's finding that the appellants established no rights by their attempted mining locations in 1963.

A finding that the appellants derived any right through conveyance to them of the interest of Mark in 1963 would, of course, require a finding that Mark's relinquishment to the United States was of no effect, for, if that relinquishment was effective, it served to extinguish any claim which Mark may have had, whether based upon his location of September 26, 1961, or upon a prior location in 1959, referred to by the appellants in their briefs.

<sup>2</sup> The appellants' contention as to the mineral value of the lands in question appears to be premised almost entirely upon the fact that the lands up creek and down creek have been worked for gold with substantial values recovered, while the subject land have never been dredged. There is, however, no presumption of mineral value arising from the fact that no minerals have been taken from a tract of land. It may at least as reasonably be inferred that the lands in question were not dredged because there was not a sufficient showing of value to warrant further working of them at the time that the adjoining lands were dredged.

It is true that a relinquishment must be voluntarily and intentionally executed and that a relinquishment which is secured through misrepresentation, fraud or deceit is void. *Ficker v. Murphy*, 2 L.D. 135 (1884); *St. Paul M. & M. Ry. Co. v. Carlson*, 4 L.D. 281 (1885); *Kerr v. Kelly*, 25 L.D. 197 (1897). The Department has also held that a relinquishment to the United States which is induced by the pendency of adverse proceedings is not "voluntary" for some purposes, but this does not make it involuntary for all purposes, and it does not nullify its efficacy as an instrument of relinquishment. See *Dorothy Ditmar*, 43 L.D. 104 (1914); *Maude L. Deering*, 43 L.D. 234 (1914); *Barnett and Morrow Land, Irrigation and Orchard Co.*, 43 L.D. 477 (1914); *Charles Perkins* (On Rehearing), 50 L.D. 172 (1923).<sup>3</sup>

While the appellants allege that Mark's relinquishment was obtained through misrepresentation, they have not, in fact, pointed out any misrepresentation. Mark simply states in his affidavit of April 22, 1964, that employees of the Bureau of Land Management made representations "that there was no gold on the claim and I could not continue to own the claim." This is no misrepresentation unless the employees knew or believed that there was a valuable deposit of gold on the claim. There is no contention that the employees had such knowledge or belief. Mark says in his affidavit that the employees said they would allow him some land where his cabin was but, presumably did not. This again falls far short even of an allegation of a misrepresentation, for there is no claim by Mark that he applied for the land and was refused or that the employees knew at the time when they spoke to him that they would not allow him to have the land.

As far as duress is concerned, Mark points in his affidavit to nothing more than that the Bureau employees told him that if he did not get off the land "they would proceed with the law against me and I didn't have the money to fight them." The fact that a Bureau employee informs a mining claimant that he does not have a valid claim and that charges will be brought against the claim unless he relinquishes it can scarcely be said to be duress. A mining claimant who knows that his claim is invalid or has strong doubts as to its validity may very well prefer to have a chance to relinquish his claim rather than to undergo the time and expense of defending against formal charges. If he is convinced that his claim is valid, he does

<sup>3</sup> In the *Ditmar* case, *supra*, the Department held that a relinquishment to the United States, executed to avoid the necessity of facing a Government contest of an entry, is not "voluntary" within the meaning of the act of March 26, 1908, 35 Stat. 48, so as to preclude the entryman from obtaining a repayment under the provisions of that act. The Department did not find, however, that such a relinquishment was ineffective to relinquish any right claimed by the entryman to the land. It merely found that for the purposes of that particular act the claimant's relinquishment was the equivalent of a "rejection" by the Department rather than a "voluntary relinquishment" by the entryman.

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not have to relinquish but may wait until adverse proceedings are formally initiated, at which time he can oppose the charges. There is no evidence in the record, and Mark does not claim, that he was not aware of his right to oppose any action which the Bureau of Land Management might propose.<sup>4</sup>

Mark asserts that he would not have executed the relinquishment had he known the "truth" at the time. This, again, is an oblique way of saying that a misrepresentation was made to him. However, the "truth" of which he speaks, apparently, is that he had a valid right to the land which he occupied as a mining claim. But upon what does he base such a conclusion? The Department has not at any time recognized the validity of his claim.

I concur, therefore, in the Bureau's finding that Mark's relinquishment was voluntarily given and that the appellants obtained no right through any conveyance from Mark. The appellants have failed altogether to allege facts which, if proved, would substantiate the charge that the relinquishment was unlawfully obtained, and a hearing on this issue is unwarranted upon the evidence contained in the record.

The remainder of the appellants' arguments have been carefully considered and are found not sufficient to warrant any other conclusion than that reached by the Bureau.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A (4) (a); 24 F.R. 1348) the decision appealed from is affirmed.

ERNEST F. HOM,  
*Assistant Solicitor.*

## APPEAL OF MORGEN & OSWOOD CONSTRUCTION CO., INC.

IBCA-389

*Decided April 21, 1966*

### Contracts: Construction and Operation: Changed Conditions—Contracts: Disputes and Remedies: Equitable Adjustments

An equitable adjustment for the costs of installing and removing a steel sheet piling cofferdam and related work will be allowed under the "first category" of the Changed Conditions clause, where plans for a pumping plant prepared for the Government by a large engineering firm of widely recognized competence included a clear indication that the sides of an ex-

<sup>4</sup> Mark stated in his affidavit of April 22, 1964, that:

"\* \* \* I did not have any money to fight any threatened charges by the employees of the Bureau of Land Management that I was violating the law as I am a poor working man."

Thus, Mark's relinquishment was in the same class as that in the *Ditmar* case, *supra*, given to avoid the trouble and expense of facing a Government contest.

cavation would stand on a steep slope, and the contractor in justifiable reliance upon that indication originally proceeded to excavate without use of a cofferdam, the contractor having no duty in the circumstances to make its own borings or to engage in other extensive and costly pre-bid checking of subsurface conditions.

**Contracts: Construction and Operation: Changed Conditions—Contracts: Performance or Default: Compensable Delays—Rules of Practice: Appeals: Dismissal**

A finding that "first category" changed conditions were encountered at the construction site for a pumping plant does not warrant the payment of expenses associated either with reasonable delay associated with the discovery of the changed conditions or for "pure" delay (standby) costs that may have been necessitated by unreasonable delay in the issuance of a ruling concerning the claimed changed conditions; therefore, a claim for reimbursement of such expenses and costs will be dismissed.

**BOARD OF CONTRACT APPEALS**

Morgen & Oswood Construction Co., Inc. has taken a timely appeal under a construction contract of the Bureau of Indian Affairs. The contract provided for construction of the Wiota Pumping Plant, located adjacent to the Missouri River near Frazer, Montana. The pumping plant is part of the Fort Peck Indian Irrigation Project.

The contract was executed on standard construction contract forms, including Standard Form 23A (April 1961 Edition). The claim presently before the Board (as a result of its denial by the contracting officer) was made under Clause 4, "Changed Conditions" of Standard Form 23A. The "Changed Conditions" clause provides in part as follows:

The Contractor shall promptly, and before such conditions are disturbed, notify the Contracting Officer in writing of: (a) subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (b) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract. The Contracting Officer shall promptly investigate the conditions, and if he finds that such conditions do so materially differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performance of this contract, an equitable adjustment shall be made and the contract modified in writing accordingly. \* \* \*

The appellant asserts that it was required to cope with physical conditions that should be recognized under the definitions contained in either (a) or (b) of the above-quoted clause. The dispute involves what Morgen & Oswood contend was quicksand—moving water mixed with sand that prevented the accomplishment of excavation work on the project by the method that Morgen & Oswood originally intended to use.

Expert testimony concerning the physical conditions at the site was given on behalf of both parties at an oral hearing held in Billings,

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Montana, in June 1965. In addition, a letter dated July 31, 1963, from a private engineering firm, discussing the appellant's excavation problems, was made a part of the appeal record by the Government. Both parties relied upon this letter in presenting their cases. The private engineering firm is a large organization which provides architectural and engineering services covering work in the United States and in other countries. It prepared the plans and specifications for the project involved in this appeal, pursuant to a contract with the Bureau of Indian Affairs. That Bureau's Area General Engineer approved the drawings submitted by the private engineering firm. The Bureau's project engineer also reviewed them, prior to the issuance of the invitation for bids, in a manner which he described as "not too thorough."

Neither the Bureau of Indian Affairs nor the private engineering firm which designed the project made core borings to determine the types of soil that would be encountered in the excavation for the pumphouse. According to the project engineer the private engineering firm went into the question of the conditions at the pumphouse site to a much greater extent than did the Bureau engineers. He explained that this was "for the simple reason they were being paid for it and they had more time to do it than we did and it is my understanding that one of the members of the firm visited the Corps of Engineers' office at Omaha, Nebraska, and went through the records on these ranges that they have on aggradation studies, that they have made and kept up since 1946 or '47, at intervals of approximately six miles from Fort Peck down to the North Dakota line."

The hearing on this appeal brought forth several surprising developments. The first was testimony by an expert in the fields of foundation investigation and engineering research who was called on behalf of the appellant. His testimony, to be discussed in detail later in this opinion, convincingly eliminated any possibility that the Board could find in this case a "second category" changed condition, i.e., one based on unknown and unusual physical conditions, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided in the contract. The second unexpected development at the hearing was the discussion by the Government's project engineer of his interpretation of the contract drawings, and of his views concerning the excavation methods originally followed by the appellant. In several important areas the project engineer and the private engineering firm hired by the Government to design the project are not in agreement.

The Government, by a letter dated July 31, 1963 (about two months after the appeal was filed), asked the private engineering firm (project designer) for its comments on the appellant's request for additional compensation, explaining the claim as follows:

\* \* \* In brief the claim is based upon conditions encountered which required temporary use of sheet piling to prevent caving if overexcavated, which the contractor contends was prohibited by the specifications, and was to be avoided. Further, the contractor alleges that Sheet 2 of the drawings represented that soil conditions were of such a stable nature that excavation could be made to the required 1994.0 level at the required 1 to 2 slope (one foot horizontal to two feet vertical) without use of any temporary curbing or support and that it relied upon such representations to its detriment. The contention is made that the plans and specifications were defective in this respect and entitle the contractor to reimbursement because conditions were misrepresented. An analysis of the sand encountered showed 97% medium to fine sand and 3% split between silt and clay. The lack of bearing power and stability may have been due to seepage pressure of water percolating through the sand in an upward direction.

\* \* \* \* \*

We feel that the 1:2 slope shown on the drawings was not excavation lines, but indicated finished product lines, i.e. that the compacted backfill must be placed to those lines. \* \* \*

A portion of the reply from the private engineering firm follows:

We have reviewed the data furnished and have given this matter considerable thought. It is evident that the plans do not anticipate encountering a very fine, granular material when excavation is made. In the absence of any borings and judging by the comparatively stable river bank slope, we assumed the material would stand temporarily on a 1 to 2 slope when excavated. The contractor could not be expected to know more about the nature of the material to be excavated than we did unless he made borings at his own expense; however, he was apprised of conditions and the extent information was available and being qualified in construction work of this nature, he could be expected to suspect that difficulties along the lines encountered might be possible and to provide for them in his bid. The fact that no log of borings was shown on the plans should indicate to him that none had been made.

The private engineering firm also informed the Government in its July 31, 1963 letter that the reason for indicating a 1 to 2 slope for the pumphouse excavation was an intention on the part of that firm's design engineers to have the discharge pipe anchored on solid ground. Such a slope allowed placement of the anchor structure as close as possible to the pumphouse. The private engineering firm also opined that a "properly installed" well point system augmented with a ring of sand bags would have removed the water so that the excavation could have been made "approximately to the 1 to 2 slope."

The Government's project engineer testified that water came into the excavation from all sides, and that at times it seemed that there was more water coming in from the land side than from the river side of the pumphouse. He regarded the water that came from the landward side as "bank storage." He said that he found exposed on the river bank, about 79 feet upstream from the pumphouse location, evidence of a sand layer. The representatives of the appellant who made an investigation of the site prior to the placing of the appellant's

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bid did not find indications of such a sand bank—apparently the design engineers for the private engineering firm also did not find them. The statements of the project engineer were not consistent with the assumptions of the private engineering firm, in that he asserted that ordinary soil will not stand or stabilize at anything steeper than a  $1\frac{1}{2}$  horizontal to 1 vertical slope (he said that in some cases it would have to be closer to  $1\frac{3}{4}$  to 1). The assumption of the private engineering firm that the material in the excavation would stand temporarily on a 1 to 2 slope has been mentioned previously.

The project engineer testified that, if charged with the responsibility, he would have kept the water and sand out of the excavation by the method chosen by the appellant. He questioned whether the well point system suggested by the private engineering firm would have been cheaper, or would have removed a serious safety problem that was caused by the unstable slopes of the excavated pit.

In its letter of July 31, 1963, the private engineering firm took specific exception to the contracting officer's stand that the 1 to 2 slope shown on the drawings represented lines to which compacted backfill must be placed, rather than excavation lines. At the hearing the project engineer supported the position of the contracting officer, testifying that the line depicted the minimum compacted backfill.<sup>1</sup>

The appellant's expert in the fields of foundation investigation and engineering research stated that the principal cause of the appellant's difficulties was a layer of sand which was encountered between elevation 2004 and elevation 2013 (these are approximate figures). This nine-foot layer of fine sand provided a route for water to flow into the excavation. The water settled in the pit at a level that was nearly the same as the level of the nearby Missouri River. The foundation expert testified that in his examination of the pumphouse excavation he found a quicksand condition. The Board finds, however, from its review of the entire record that the condition was one involving a moving layer or belt of sand rather than a true quicksand condition. Water flowing through the sand layer caused the sand particles<sup>2</sup> to run into the excavation. There is not enough evidence of water welling upward

<sup>1</sup> The Government counsel seemed to have a third theory on the meaning of the 1:2 slope lines. His questions at the hearing suggested that the private engineering firm in preparing the designs had made an error in showing excavation lines that were so steep.

<sup>2</sup> Control of the water portion of the sand and water mixture clearly was an obligation of the appellant. Section 1-02 of the contract's Technical Specifications provides in part: "It will be the contractor's responsibility to care for all water in the construction area, including surface runoff, seepage from the river, and area flooding in event of high river stages. \* \* \* The pumphouse structure is set back sufficiently from the river bank to permit its construction without requiring a cofferdam extending into the river channel. Sandbagging or other temporary measures may be necessary in event of extreme high water and shall be done at the contractor's expense and discretion. The contractor shall take precautions to dry up the foundation area so that no concrete will be placed in water or on saturated fill."



into the excavation to warrant a finding that a quicksand condition existed.

The appellant's expert concluded that although the nine-foot layer of sand was thicker than usual, it nonetheless was a "normal alluvial deposit," and that the condition at the excavation site was "not an uncommon condition for this type of material." The Board finds that the appellant did not prove by a preponderance of the evidence<sup>3</sup> that the sand layer in the pumphouse excavation was either an "unknown" condition or an "unusual" condition within the meaning of the Changed Conditions clause. Therefore, if the appellant is to recover, it must be under the first category of that clause—the one referring to subsurface or latent physical conditions at the site differing materially from those indicated in the contract.

The appellant's expert referred to the designer of the project as one of the best international engineering firms. He joined in the view expressed by that firm that the 1:2 lines shown on two drawings covering the pumphouse work were excavation lines, not merely lines guiding the placement of compacted backfill. He disagreed, however, with the same firm, in his conviction that prospective bidders on the project were entitled to assume that core samples assuredly were the basis for the indications that the ground would support an excavation with slopes as steep as those shown on the drawings.

Taking into account the entire appeal record, and the relative positions of the parties at the time the bids were placed, it is found that a "first category" changed condition existed on this project. The appellant should not have been expected to take his own borings or to make an extensive check on the reliability of the clearly indicated excavation lines.<sup>4</sup> The lines showing the slope of the excavation cast the only ray of light on a matter where the contractor otherwise was in the dark. The private engineering firm in designing the project apparently included those lines on the basis of an assumption—perhaps even a guess. The Government should have anticipated that its bidders would place great faith in the details of design that were included on the project drawings by the internationally respected firm that it hired.

Three major questions must be faced in the calculation of the equitable monetary adjustment that is called for in this appeal. One comes from a special clause used by the Bureau of Indian Affairs to modify the Changed Conditions clause. The second question concerns our authority to make an allowance for standby or "pure" delay costs. The third is related to the Government's assertion that the amount claimed by the appellant for taking the steps necessary to adapt to the changed conditions is excessive.

<sup>3</sup> *Ray D. Bolander Company, Inc.*, IBCA-331 (November 16, 1965), 72 I.D. 449, 65-2 BCA par. 5224.

<sup>4</sup> *Sulzbach Construction Company*, ASBCA Nos. 5699, 5701, 5703 (January 28, 1960), 60-1 BCA par. 2496.

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The special clause, included in the contract's Special Conditions, is as follows:

13. *Changes and Changed Conditions*: The contractor's attention is called to Clauses 3 and 4, General Provisions, Standard Form 23A, which deal with changes and changed conditions in the specifications (not variations in the quantities included in the Bid Schedule when no change in the scope of the specifications are involved) which may or may not result in an increase or decrease in the contract price or any extension of the contract completion time. Such changes must be authorized in writing by the contracting officer. When such changes become necessary they will be accomplished by applying the following applicable provisions:

When a change in the specifications is made, or where changed conditions are involved, the contractor will be ordered, in writing, to make the change which will be described and to submit a proposal, covering all costs for making the change, whether involving an increase or decrease, in the contract price which shall include a request for an extension of time if warranted. Where "Unit Prices" in the bid schedule apply to any part of the work involved, they shall be used. Amounts of overhead and profit will not be allowed on that part of the work covered by the "Unit Prices."

Special Condition 13 appears to enlarge the duties of the contractor beyond those delineated in one of the holdings in *Shepherd v. United States*, 125 Ct. Cl. 724 (1953), which states that the only initial obligation of a contractor who concludes that he has encountered changed conditions is to give notice of such conditions to the contracting officer. *Shepherd* holds further that once that notice has been given, the contractor has no further duty to perform until after the contracting officer has investigated the conditions and *has issued a ruling* on whether or not the conditions are different to such an extent as to require an equitable adjustment.

In the last week of March 1963, the appellant's construction forces encountered the sand condition, and it was necessary to discontinue construction operations because sand and earth kept sloughing off from the sides of the excavation and piling up on the bottom. On Monday, April 1, 1963, the attorney for the appellant wrote to the Government advising that excavation "under the present plans" was impossible and that this fact had been brought to the attention of a Government inspector on March 29, 1963. Assertions that a changed condition had been encountered, that the plans and specifications would have to be changed, and that extra costs would result from the changed conditions were made specifically in the April 1, 1963 letter.

The contracting officer replied in a letter dated April 4, 1963, advising the appellant that the project engineer would "go over this problem." On April 6, 1963, the project engineer inspected the site. The appellant's project superintendent testified that the project engineer on that date directed how the excavation work should proceed, and that contemporaneously he (the appellant's superintendent) made the following entry in a log:

[The project engineer] directed us orally to continue the excavation, with the excavation de-watered, we were to try to determine the depth of sand. He is of the opinion that the bank of the excavation will stand. He is still of the opinion it can be done without a cofferdam.

An early investigation was made of the conditions complained of by the appellant, but there was a serious delay in issuance of the contracting officer's ruling. On April 29, 1963, more than three weeks after the project engineer investigated the excavation problems, the contracting officer (in Billings, Montana) received a report on the matter from the project engineer. The report was sent from Wolf Point, Montana, and advised that the project engineer had not replied before "due to inclement weather, rain and snow, mud and water that kept the contractor from doing any work or exploration at the site." Concerning the April 6, 1963 meeting at the site, he stated:

\* \* \* Mr. Osgood asked what they should do about it [the sand and water condition]; I told them that it was up to them, what they should do, but that if I were doing the job I would want to find out how deep and how much sand there was before I made any decision. I made it very plain that what they did or accomplished was their responsibility and not the responsibility of the Government. Before Mr. Popiel and Mr. Osgood left [on April 6] they decided that on Monday, April 8th, they would try to probe the sand to see if they could find out how much there was.

The project engineer's report indicates that because of a heavy snowstorm, no work was performed during the period of April 8 through April 12, 1963, and that on April 15, a Monday, employees of the contractor probed with a metal rod to determine the depth of the sand layer. The project engineer expressed the opinion in his report that the contractor would have to flatten out the walls of the pits to a more stable slope, or shore it up in some manner.

On April 26, 1963, the project engineer received a letter from the appellant's attorney which expressed the view that the project engineer's suggestion that the contractor go ahead with the excavation in any manner that it saw fit and then attempt to make a claim for extra compensation "does not appear to be in conformity with the contract." The letter also recommended that the plans and specifications be modified to provide for the construction of a cofferdam and related work. An estimate of approximately \$27,000, including \$2,892 for "standby" costs was attached to the letter. On May 8, 1963, the appellant's attorney wrote to the contracting officer, noting that no reply to the contractor's letter of April 1 had been received.<sup>5</sup>

On May 10, 1963, the project engineer wrote a second memorandum discussing his April 6 examination of the excavation. His recollection was that he had advised the contractor's representative as follows:

<sup>5</sup> In fact, the contracting officer had replied on May 4 that the project engineer would "go over" the problem. Presumably, however, the appellant was concerned about the fact that five weeks had gone by without any expression from the contracting officer concerning its assertion that changed conditions had been encountered.

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\* \* \* I did make the statement that if it was "my job" I would like to know what I had to contend with, but that it was not "my job" and that it was the responsibility of the contractor and that it was up to him alone as to what method was used in the construction of the pumping plant.

\* \* \* it was my feeling at the time that not enough was known as to the depth and the extent of the sand for the contractor to decide what method of construction to use in completing the construction.

The contracting officer told the appellant's attorney (by telephone) on May 9, 1963, that the appellant should proceed with the work as it thought best. By a letter dated May 15, 1963, the contracting officer informed the appellant that it had "failed to establish that conditions have been encountered which differ materially from those which could ordinarily be expected as generally inhering in work of the character required by the contract \* \* \*." The appellant's counsel charges that the delay between April 1, 1963 and May 16, 1963 was unreasonable and inexcusable. A portion (\$8,974) of the appellant's total claim of \$29,689, as summarized in a document submitted on July 15, 1965, is for "extra compensation for standby time, for equipment and field personnel, for period April 1 through May 6, 1963."

The Government is not liable for the financial consequences of reasonable delay associated with the discovery of changed conditions. *United States v. Rice*, 317 U.S. 61 (1942). This Board does not have jurisdiction in this case<sup>6</sup> to authorize reimbursement of the contractor's excess costs that arose from a standby ("pure" delay) operation that may have been necessitated by unreasonable delay in the Government's issuance of a ruling concerning the claimed changed conditions. A claim for such standby costs is one for damages resulting from breach of contract, for which boards of contract appeals traditionally do not grant relief. *Intermountain Company*, ASBCA No. 4693 (July 9, 1958), 58-2 BCA par. 4693. Accordingly, the part of the claim that is for standby costs for the period April 1 through May 16, 1963, is dismissed.

### *The Equitable Adjustment for Controlling the Nine-Foot Layer of Fine Sand*

In his post-hearing brief the appellant's counsel argued that the appeal record will support an adjustment of \$20,715 for the cost of constructing and removing the sheet piling cofferdam (and related activities). The Government's post-hearing brief included as estimate of \$10,496.71 for this work, which is referred to as Claim 2 in the briefs. In a reply brief the appellant's counsel submitted a revised recapitulation of Claim 2, reducing it to \$18,394.47.

<sup>6</sup> The contract does not contain the clause entitled Price Adjustment for Suspension, Delay or Interruption of Work, which is available for use on an optional basis in contracts of the Department of the Interior.

The Board's review of the Government's rationale supporting its estimate of an equitable adjustment for Claim 2 has disclosed that for both labor and equipment it includes an unreasonably low number of days during which construction and removal work on the cofferdam was in progress. On the other hand, the appellant's figures do not include adjustments in two important areas. The first reduction that should be made is one to reflect the fact that installation of the cofferdam saved the contractor the expense of removing additional material in the top half of the excavation—if the cofferdam had not been installed removal of a substantial quantity of earth (and perhaps use of some shoring) would have been necessary to ensure the safety of the workmen even in the absence of a changed condition. In addition, equipment assigned to a job to perform extra work resulting from changed conditions, but which is in actual operation only part of the time during the period required for the performance of such work, should be charged for at 50% of operating equipment rates during the periods when it is not in use. *J. D. Shotwell Company, ASBCA No. 8961* (November 30, 1965), 65-2 BCA par. 5243. A reduction in the claim amount to take this requirement into account is called for. Because the parties are so far apart in their estimates of an equitable adjustment for Claim 2, and because definite information seemingly is not available as to some items of cost, absolute certainty in the calculation of an adjustment is not possible. However, considering all of the factors discussed above, the Board finds that the equitable adjustment for Claim 2 should be \$14,615.

### *Conclusion*

The appeal is dismissed as to the claim for standby costs (Claim No. 1). The appeal is sustained as to the claim that the appellant encountered changed conditions to the extent that appellant is entitled to an equitable adjustment (for Claim 2) of \$14,615.

DEAN F. RATZMAN, *Chairman.*

WE CONCUR:

THOMAS M. DURSTON, *Deputy Chairman.*

WILLIAM F. MCGRAW, *Member.*

### APPEAL OF ZINSCO ELECTRICAL PRODUCTS

IBCA-528-11-65      *Decided April 22, 1966*

Contracts: Disputes and Remedies: Damages: Liquidated Damages—  
Contracts: Performance or Default: Generally—Contracts: Disputes  
and Remedies: Damages: Actual Damages

Liquidated damages provisions in contracts are valid and enforceable if, judged as of the time the contract was entered into, they bear a reasonable relationship to the damage which could be expected to flow from delayed performance, and the amount of possible actual damages would be difficult

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or impossible of ascertainment in advance, even though as it turned out the actual damages sustained by the Government are uncertain in amount and appear to be minimal.

### BOARD OF CONTRACT APPEALS

The contractor, through its attorney, has appealed from the contracting officer's Findings of Fact of October 13, 1965, under which liquidated damages were assessed in the amount of \$2,050 for delays in delivery of reproduced tracings called for by the contract. Neither party having requested a hearing, the case will be decided on the basis of the appeal record.

The contract, dated May 7, 1964, includes Standard Form 33 (October 1957 Edition) and incorporates the General Provisions of Standard Form 32 (September 1961 Edition) for supply contracts. The following items were required to be furnished:

Item No.	Articles or Services	Amount
2	Thirteen (13) alternating-current distribution boards, designated M1A, M2A, M3A, M4A, MSA, MSB, MSC, MCA, MCB, N1A, N3A, NCA and NSA, shall be furnished complete in accordance with this invitation; delivery fob railroad cars or trucks at Hardin, Montana * * *	
	for the lump sum of-----	*\$6,269.86 (Price for 13 boards)

"Complete shipment of the equipment under Item 2 from a United States shipping point or points stated below will be made within 365 calendar days after date of receipt of notice of award of contract. \* \* \*

\*Reflects reduction account waiver of performance bond requirement.

The Notice to Proceed was acknowledged by the contractor on May 11, 1964, resulting in a scheduled completion date for shipment under the contract of May 11, 1965. The distribution boards covered by the contract were actually shipped on May 9, 1965. The contract provided, however, for the delivery of "reproduced tracings of all drawings," at least ninety (90) calendar days prior to the contract shipping date<sup>1</sup> and made delays in delivery thereof subject to the assessment of liquidated damages at the rate of \$25 per day.<sup>2</sup> Deliveries of the reproduced tracings were not made until May 3, 1965, or some 82 days

<sup>1</sup> Paragraph B-3 of the contract's Special Requirements reads:

"Drawings and Data to Be Furnished by the Contractor \* \* \* e. Reproduced tracings of drawings.—In addition to the foregoing, the contractor shall furnish full-size reproduced tracings of all drawings including layout drawings, structural-steel drawings, bills of material, internal wiring diagrams (if not shown on panel wiring diagrams) and all electrical schematic and wiring diagrams. The tracings shall: (1) Be delivered to the contracting officer at least ninety (90) calendar days prior to the contract shipping date for the equipment (see Paragraph B-9). \* \* \*

<sup>2</sup> In pertinent part the contract provides: "B-9. Delays—Liquidated Damages \* \* \* In addition to both of the foregoing, if the contractor refuses or fails to deliver the complete and acceptable set of reproduced tracings, as required by Subparagraph B-3e. to the Office of Chief Engineer ninety (90) calendar days prior to the contract shipping date for the equipment, then liquidated damages, in the amount of twenty-five dollars (\$25) per day, will be assessed the contractor for each calendar day that the date of receipt of the complete set of reproduced tracings, or any part thereof, is delayed."

after the delivery date specified therefor in the contract. The liquidated damages assessed of \$2,050 represent the 82 days of delay involved multiplied by the agreed upon rate for liquidated damages of \$25 per day.

In its Notice of Appeal of November 12, 1965, the appellant attacks the contracting officer's findings as erroneous on two grounds, viz: "1. There has been no actual damage suffered by the Government by virtue of the late delivery of reproducible tracings. 2. The liquidated damages provision in the contract is in the nature of a penalty and there is no relationship between the sum stated to be assigned for liquidated damages and any actual damage stemming from a breach of the agreement." As to the first contention the appellant had previously called attention to the fact that drawings, preliminary to those required by subparagraph B-3e of the contract's Special Requirements, were delivered on the project on February 18, 1965, and that, subject to minor corrections, such drawings had been approved by the Government. Commenting upon this aspect of the case the appellant's attorney states:<sup>3</sup> "\* \* \* By virtue of their being on the job, it is impossible to imagine how or in what manner the Government could have suffered 'actual damage' by virtue of the fact that the reproducible tracings were not delivered until May 3, 1965. \* \* \*"

Treating this latter argument in the Findings of Fact of October 13, 1965, the contracting officer states: "In the letter of September 22, 1965, it is urged that I consider the requirement for reproduced tracings to be fulfilled by the submittal of drawings with your letter of February 12, 1965, which was received on February 18, 1965. \* \* \* I cannot find that the submittal of February 12, 1965, fulfilled the requirements for reproduced tracings, nor can I find that they substantially fulfilled that requirement. They were plainly drawings for approval and were handled as such. Furthermore, the specific requirement of Paragraph B-9, as previously set forth, relates liquidated damages to reproduced tracings, and not to drawings for approval."

The appellant was afforded an opportunity to offer evidence to show that the delays involved in furnishing the reproduced tracings were attributable to an excusable cause of delay,<sup>4</sup> but has failed to do so. In fact, it has not even alleged that it was excusably delayed in the performance of the contract.

Contentions similar to those made by the appellant in the instant appeal have been considered by the Board on a number of occasions.<sup>5</sup>

<sup>3</sup> Letter of September 22, 1965.

<sup>4</sup> In the decision from which the appeal was taken the contracting officer stated: "Under the contract, I can consider requests for extensions of time for delays due to causes described in Clause No. 11 of the General Provisions and Paragraph B-9 of the Special Requirements. If you wish to furnish any information regarding any such delays, I will consider them and issue my decision on such requests. Otherwise, on the basis of the material presently before me I must conclude that the delay is not excusable. \* \* \*"

<sup>5</sup> *American Ligurian Company, Inc.*, IBCA-492-4-65 (January 21, 1966), 73 I.D. 15, 66-1 BCA par. 5326; *Sunset Construction, Inc.*, IBCA-454-9-64 (October 29, 1965), 72

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While the Government takes exception to the appellant's contention that the Government suffered no actual damage as a result of the late delivery of reproduced tracings,<sup>6</sup> we need not pass upon this point. Both the Courts<sup>7</sup> and the Board<sup>8</sup> have held that actual damages need not be shown in circumstances where, judged at the time of contracting, (i) the damages likely to result from delayed performance are uncertain in amount or are difficult to ascertain and (ii) the amount of liquidated damages provided for in the contract has been established in a fair and reasonable attempt to fix just compensation for anticipated loss covered by breach of contract.

In the very recent case of *Southwest Engineering Company v. United States*, 341 F. 2d 998 (8th Cir. 1965), cert. den. 382 U.S. 819, the Court sustained the liquidated damages assessed in circumstances where the parties had stipulated that the Government had suffered no actual damages as a result of the delayed performance. Addressing itself to the argument that the liquidated damages there provided for constituted penalty provisions, the Court stated: "Two requirements must be considered to determine whether the provision included in the contract fixing the amount of damages payable on breach will be interpreted as an enforceable liquidated damage clause rather than an unenforceable penalty clause. First, the amount so fixed must be a reasonable forecast of just compensation for the harm that is caused by the breach, and second, the harm that is caused by the breach must be one that is incapable or very difficult of accurate estimation. \* \* \* Whether these requirements have been complied with must be viewed as of the time the contract was executed rather than when the con-

I.D. 440, 65-2 BCA par. 5188; *McGraw-Edison Co.*, IBCA-434-4-64 (May 17, 1965), 65-1 BCA par. 4852; *Southwest Welding & Manufacturing Division, Yuba Consolidated Industries*, IBCA-281 (October 29, 1962), 69 I.D. 173, 1962 BCA par. 3564; *Refer Construction Co.*, IBCA-267 (May 19, 1961), 68 I.D. 140, 61-1 BCA par. 3048; *Truax Machine & Tool Co.*, IBCA-195 (July 21, 1959), 59-2 BCA par. 2280; and *Parker-Schram Co.*, IBCA-96 (April 7, 1959), 66 I.D. 142, 59-1 BCA par. 2127.

<sup>6</sup> In its Statement of Position the Government states: "\* \* \* There is no reason whatsoever to believe that the Government suffered no actual damage; \* \* \* there is no case involving delay under a Bureau contract where actual damage, however minimal, has not been suffered. This is simply due to the inherent and inevitable effect of a delay; it must of necessity cause increased costs to the Government, if for no other reason than increased overhead costs."

<sup>7</sup> *Priebe & Sons v. United States*, 332 U.S. 407 (1947); *Wise v. United States*, 249 U.S. 361 (1919); and *United States v. Bethlehem Steel Co.*, 205 U.S. 105 (1907), in which the Court noted the development that had occurred in the law respecting liquidated damages, stating: "\* \* \* The Courts at one time seemed to be quite strong in their views and would scarcely admit that there ever was a valid contract providing for liquidated damages. Their tendency was to construe the language as a penalty, so that nothing but the actual damages sustained by the party aggrieved could be recovered. Subsequently the courts became more tolerant of such provisions, and have become strongly inclined to allow parties to make their own contracts, and to carry out their intentions, even when it would result in the recovery of an amount stated as liquidated damages, upon proof of the violation of the contract, and without proof of the damages actually sustained. \* \* \* The question always is, What did the parties intend by the language used? When such intention is ascertained it is ordinarily the duty of the court to carry it out. \* \* \*"

<sup>8</sup> See cases cited in Note 5, *supra*.



tract was breached or at some other subsequent time. Courts presently look with candor upon provisions that are deliberately entered into between parties and therefore do not look with disfavor upon liquidated damage stipulations. \* \* \*

Turning now to the facts involved in the instant appeal we note that the appellant has offered no proof in support of its contentions;<sup>9</sup> nor has it cited any authority in support of the propositions advanced. Taking cognizance of the relationship between the reproduced tracings in question and the Yellowtail Powerplant for which they were procured, we find that, viewed as of the time of contracting, the damages likely to result from delays in furnishing the required tracings would have been difficult, if not impossible, to estimate. We further find that viewed in the same perspective the amount of liquidated damages provided for bore a reasonable relationship to the amount of actual damages that could have been expected to flow from delays in furnishing the reproduced tracings as required by the contract.<sup>10</sup>

As to the appellant's contention that the preliminary drawings submitted for approval on February 18, 1965, should have been accepted as satisfying the contract requirement for an acceptable set of reproduced tracings, we are without authority to substitute a different agreement for the agreement that the parties have made.<sup>11</sup>

### *Conclusion*

On the basis of the facts found and the authorities cited, the Board concludes that the appellant has failed to show that the liquidated damages assessed for delayed performance of the contract were improper. Accordingly, the appeal is denied.

WILLIAM F. MCGRAW, *Member.*

WE CONCUR:

DEAN F. RATZMAN, *Chairman.*

THOMAS M. DURSTON, *Deputy Chairman.*

<sup>9</sup> Mere allegations are not an acceptable substitute for proof. *American Ligurian Company, Inc.* and *Sunset Construction, Inc.*, note 5 *supra*.

<sup>10</sup> The contractor was unquestionably aware from the terms of the invitation that the items covered by the contract were required for the Yellowtail Powerplant, E.g., Supplemental Notice No. 1 to Invitation No. DS-6084 dated April 15, 1964, makes this clear. Commenting upon this relationship the Department Counsel states: "\* \* \* Needless to say, the problems that could arise from the lack of tracings are varied, and could range from minor problems perhaps involving a minimum of time or money, to a situation where a whole power system was out of commission for quite some time—involving the loss of thousands of dollars per day by the Government. \* \* \* this contract is an integral part of the equipment for Yellowtail Powerplant. Looking at it as of the time the contract was entered into, a delay in the submission of the reproduced tracings quite probably could have resulted in the delay in installation or operation of the equipment called for under the contract, as well as to the associated and inter-related equipment at Yellowtail Powerplant. \* \* \*"

<sup>11</sup> *Sunset Construction, Inc.*, note 5, *supra*; *R & R Construction Company*, IBCA-413 and IBCA-458-9-64 (September 27, 1965), 72 I.D. 385, 65-2 BCA par. 5109.

*May 2, 1966***RICHARD C. COOK  
RAY LA FRENERE****A-30532***Decided May 2, 1966***Oil and Gas Leases: Applications: Sole Party in Interest**

When an oil and gas lease offer, filed on a drawing entry card, contains the name of an additional party in interest, and the required statement of interest, copy or explanation of the agreement between the parties, and evidence of the qualifications of the additional party to hold such interest are not filed within the time allowed by the Department's regulations, the offer is properly rejected.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Richard C. Cook and Ray La Frenere have appealed to the Secretary of the Interior from a decision dated July 8, 1965, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed a decision of the Fairbanks, Alaska, land office rejecting their noncompetitive oil and gas lease offers, Fairbanks 032763, 032765 and 032847, filed pursuant to section 17 of the Mineral Leasing Act, as amended, 74 Stat. 781 (1960), 30 U.S.C. § 226 (1964).

The lease offers were filed by appellant Cook for inclusion in a drawing of simultaneously filed lease offers held on June 11, 1964. Each offer was filed on Form 4-1720 (February 1964), Special Alaska Oil and Gas Drawing Entry Card, and each offer listed appellant La Frenere as having a 66 percent interest in the offer.

By a decision dated July 10, 1964, the land office rejected the offers for the reason that the separate statement and copy of the written agreement, if any, required by 43 CFR 3123.2(c) (3) were not filed.<sup>1</sup> The Office of Appeals and Hearings, noting that the regulation also required that all interested parties must submit evidence of their

<sup>1</sup> The cited regulation provides in pertinent part that:

"\* \* \* If there are other parties interested in the offer a separate statement must be signed by them and by the offeror, setting forth the nature and extent of the interest of each in the offer, the nature of the agreement between them if oral, and a copy of such agreement if written. Such separate statement and written agreement, if any, must be filed not later than 15 days after the filing of the lease offer. All interested parties must furnish evidence of their qualifications to hold such lease interest."

qualifications to take and hold the interests sought, found that the necessary showing was not made within the time allowed by the regulation and that the offers were properly rejected, citing *Genia Ben Ezra et al.*, 67 I.D. 400 (1960), and *Gerald Breslawer*, A-29129 (January 10, 1963).

The appellants do not deny their failure to comply with the requirements of the regulation. They contend, however, that substantial compliance with the requirements was made in that all the information called for by the special card was given and that the demand for additional information was apparently based upon the technicality of the information called for by Form 4-1158 (Offer to Lease and Lease for Oil and Gas), which was not used in the drawing. They assert that reference was made to 43 CFR 192.42 (e) and (f) (now 43 CFR 3123.2), that the cited regulation requires the filing of Form 4-1158 in five copies but that, for the special drawing, filing an offer on the drawing entry card was deemed sufficient compliance, and that Form 4-1158 became applicable after an acceptance by the Department. They further contend that there was no space for signature by La Frenere on the drawing entry card and that acceptance was never given to allow the parties to complete Form 4-1158 and to comply with the requirements of that form. In substance, then, the appellants contend simply that compliance with the provisions of 43 CFR 3123.2(c)(3) was not required until after Form 4-1158 had been completed.

This contention lacks merit, and the appellants' arguments reflect a basic misunderstanding of the applicable regulations.

By regulations published on February 15, 1964 (29 F.R. 2502, now contained in 43 CFR 3123.9), the Department prescribed the current system for the leasing, by leasing units identified by parcel numbers of lands included in expired, canceled, relinquished, or terminated oil and gas leases and for the filing of simultaneous lease offers for such parcels of land. The regulation provides in part that:

Offers to lease such designated leasing units by parcel numbers must be submitted on a form approved by the Director, "Simultaneous Oil and Gas Entry Card" signed and fully executed by the applicant or his duly authorized agent in his behalf. The entry card will constitute the applicant's offer to lease the numbered leasing unit by participating in the drawing to determine the successful drawee. By signing and submitting the entry card, the applicant agrees that he will be bound to a lease on a current form approved by the Director for the described parcel if such a lease is issued to him as a result of the drawing. \* \* \* 43 CFR 3123.9(c), formerly 43 CFR 192.43(c).

The drawing in which the appellants participated, termed a "special drawing," was conducted pursuant to the foregoing regulation, and the drawing entry cards filed by the appellants conformed in substance and form with the "Simultaneous Oil and Gas Entry Card" prescribed by the regulation. Each card stated on its face that:

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\* \* \* The undersigned agrees that the successful drawing of this card will bind him to a lease, on Form 4-1158, for the described parcel if such a lease is issued to him by the Bureau of Land Management as a result of this drawing.

On the reverse side of the card, below the heading "Other Parties in Interest,"\* appeared the following:

\* NOTE: Compliance must be made with the provisions of 43 CFR 192.42 (e) and (f) [43 CFR 3123.2].

Contrary to the assertion of the appellants, the regulations cited on the drawing entry card contain no reference to the filing of Form 4-1158. They simply set forth the items of information or documentation that are required to accompany a lease offer or to be filed within a prescribed period after the filing of the offer. The requirement for the filing of Form 4-1158, which is set forth in 43 CFR 3123.1, formerly 43 CFR 192.42 (a) and (b), provides in part that:

(a) *Except as provided in § 3123.9, to obtain a non-competitive lease an offer to accept such lease must be made on a form approved by the Director. "Offer to lease and lease for oil and gas" [Form 4-1158], or on unofficial copies of that form in current use \* \* \*. (Italics added.)*

(b) Five copies of the official form, or valid reproduction thereof, for each offer to lease shall be filed in the proper land office \* \* \*.

Thus, the specification of information which must accompany an oil gas and lease offer is set forth quite independent of the provision for the form which is to be used for submitting an offer. The form used by the appellants contained adequate notice of the regulations with which they were required to comply as a condition to the acceptance of their lease offers,<sup>2</sup> and the appellants' statement that they gave all of the information called for by the drawing entry card is factually incorrect. Accordingly, their offers were properly rejected for the reasons given by the Bureau. See *Timothy G. Lowry*, A-30487 (March 16, 1966).

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4) (a); 24 F.R. 1348), the decision appealed from is affirmed.

ERNEST F. HOM,  
*Assistant Solicitor.*

<sup>2</sup> The drawing card stated specifically that the offeror certified "(3) that the applicant is the sole party in interest in this offer and the lease if issued, or if not the sole party in interest, that the names and addresses of all other interested parties are set forth on the reverse hereof." As noted earlier, on the reverse side of the card appeared the heading "Other Parties in Interest" with the notation that compliance must be made with 43 CFR 192.42 (e) and (f). The pertinent provisions of the regulation, now in 43 CFR 3123.2, are set forth in footnote 1.

## STATE OF LOUISIANA v. STATE EXPLORATION COMPANY, ET AL.

A-30505

*Decided May 12, 1966***State Grants—Swamplands**

A selection made in behalf of the State of Louisiana under the Internal Improvement Act of September 4, 1841, prior to the Swamp Land Act of March 2, 1849, but approved thereafter, is considered as appropriating the land and precluding the grant of swamplands to the State under the 1849 act, and a subsequent relinquishment of the States' claim under the 1841 act many years later cannot effectuate the grant under the act of 1849 or the general Swamp Land Act of September 28, 1850, since they are grants *in praesenti* operating upon facts as of their dates of the enactment, and do not apply to facts which have changed after their enactment.

**Oil and Gas Leases: Generally—Oil and Gas Leases: Cancellation—Oil and Gas Leases: Lands Subject to—Public Lands: Jurisdiction Over—Rules of Practice: Hearings—Rules of Practice: Private Contests—State Grants—Swamplands**

Where the Bureau of Land Management has required a State, which filed a swampland selection, to contest a Federal oil and gas lease by establishing evidence at a hearing as to the character of the land at the date of the Swamp Land Act, the Department is not limited in its consideration of the State's application to the sole question of the character of the land at the date of the Swamp Land Act, but may also resolve any legal issues which will determine whether title should be approved in the State.

**Oil and Gas Leases: Cancellation—State Grants—Statutory Construction: Generally**

Land grants are construed in favor of the United States and therefore any doubts as to the inapplicability of a State grant to lands leased for oil and gas purposes by the United States as Federal lands, which would necessitate the cancellation of the lease, should be resolved in favor of the United States.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

An appeal to the Secretary of the Interior from a decision by the Chief, Office of Appeals and Hearings, Bureau of Land Management, dated May 20, 1965, has been filed by the State Exploration Company and Trice Production Company (reorganized), lessees of Federal oil and gas lease BLM 017566 for lot 6 sec. 31, T. 13 S., R. 3 E., La. Mer., Louisiana. The decision ruled that the lease is ineffective and subject to cancellation because it found that the lot was swampland with title passing to the State of Louisiana under the Swamp and Overflowed Land Act of March 2, 1849, 9 Stat. 352, and that the State's selection for the lot should be approved and patent to the State issued after cancellation of the lease.

Oil and gas lease BLM 017566 was issued effective February 1, 1950, to Edward F. LeBlanc under the Mineral Leasing Act of 1920, 41 Stat. 437, as amended, 30 U.S.C. § 181 *et seq.* (1964). The record title interest in the lease is now held by the above-named appellants, with

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certain royalty interests being held by other parties. The lease is currently in an extended term.<sup>1</sup>

By a letter of April 18, 1962, the State of Louisiana requested a confirmation of a selection made by the State on June 27, 1850, under the 1849 act of certain lands, including the lot in question here, pursuant to the act of March 3, 1857, 11 Stat. 251 (subsequently enacted as Rev. Stat. § 2484 (1875), 43 U.S.C. § 986 (1964)), conferring title in States to lands selected or reported to the General Land Office as swamp and overflowed lands prior to the date of the act so far as they remained vacant and unappropriated. The Bureau of Land Management on June 21, 1962, issued a clear list (No. 317) to the State. However, this was subsequently revoked by a land office decision issued December 5, 1962, which restored the selection to its pre-existing status as an application and required the State to initiate a contest proceeding against the conflicting oil and gas lease to establish the swamp character of the land. Citing as authority departmental rulings *State of Louisiana, Thomas Connell, A-27817* (January 30, 1959), and *Thomas Connell, A-29036* (October 16, 1962). By a decision dated January 30, 1963, the Acting Associate Director, Bureau of Land Management relieved the State of the necessity of instituting a contest and directed that a hearing be held, with the burden of proof to be on the State.

The hearing commenced on May 27, 1963, but was continued in view of bankruptcy proceedings of the Trice Production Company. After various postponements it was resumed on March 3, 1964.

In the meantime, the State discovered that the selection made in 1850 by the State had been rejected on May 11, 1853. Therefore, it made a new selection on May 30, 1963. This selection was approved by the decision of the Chief, Office of Appeals and Hearings, who made the initial decision in this proceeding, the hearing examiner having been instructed to make only a recommended decision.

In his decision, the Chief, Office of Appeals and Hearings reviewed the evidence introduced by the State to support its claim that the lot was swampland as of the date of the act of March 2, 1849, and found that it satisfactorily proved the State's claim. He ruled that, as the grant to the State under the Swamp Land Act was a grant *in praesenti*, once it is determined that the lands are of the character described in the act the State's inchoate title becomes perfect as of the date of the act, citing *Michigan Land and Lumber Company v. Rust*, 168 U.S. 589 (1897); that after the Department makes such a determination its lack of jurisdiction over the land and minerals in it becomes confirmed

<sup>1</sup> The lease became extended by being in a producing status under a communitization agreement No. 14-08-001-6695, approved December 29, 1959, effective June 3, 1958, with production commencing on January 22, 1960, from a well within the communitized area. The area was placed within the undefined known geologic structure of the Theall field, effective January 22, 1960. On March 27, 1963, the Secretary of the Interior approved a Theall unit agreement proposal, effective as of April 1, 1962.

and any action taken regarding their disposition before that time is rendered ineffective, citing *United States v. Minnesota*, 270 U.S. 181, 206 (1926); *State of Louisiana et al.*, A-27345 (March 4, 1957); and that therefore oil and gas lease BLM 017566 is ineffective. He dismissed legal arguments made by the lessees as grounds for barring the passage of title to the State, finding no grounds for an alleged estoppel against the State, finding that the lands were public lands at the time of the 1849 act, and refusing to find that the State was precluded from selecting the lands under the Swamp Land Act at this time because of a prior selection of the same lands under another act which selection had been relinquished.

The act of March 2, 1849, under which the State claims the land, grants the swamp and overflowed lands in Louisiana to that State, with fee simple title to vest in the State upon approval by the Secretary, so far as the lands are not claimed or held by individuals.<sup>2</sup> There were certain exceptions not applicable here. An act somewhat similar to this was passed on September 28, 1850, 9 Stat. 519, granting to the State of Arkansas and other States of the Union in which such lands may be situated, for a like purpose, "the whole of those swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this act \* \* \*." The 1850 act provided that it was the duty of the Secretary of the Interior, as soon as practicable after the act, to make out an accurate list and plots of the lands and transmit the same to the Governor of the State and at his request "cause a patent to be issued to the State therefor: and on that patent, the fee simple to said lands shall vest in the said State \* \* \*." The general provisions of the 1850 act were carried into sections 2479-2481 of the Revised Statutes (1875), 43 U.S.C. §§ 982-984 (1964).

This Department has considered the 1850 act to be substantially a reenactment of the 1849 act so far as Louisiana is concerned, with the restrictions and exceptions of the earlier act removed. See *State of Louisiana*, 32 L.D. 270 (1903). However, the Supreme Court has assumed, without deciding, that under the practice of this Department

<sup>2</sup> The act of March 2, 1849 (9 Stat. 352), provides in part as follows:

"That to aid the State of Louisiana in constructing the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, which may be or are found unfit for cultivation, shall be, and the same are hereby, granted to that State.

"SEC. 2. And be it further enacted, That as soon as the Secretary of the Treasury [thereafter the Secretary of the Interior], shall be advised, by the Governor of Louisiana, that that State has made the necessary preparation to defray the expenses thereof, he shall cause a personal examination to be made, under the direction of the surveyor-general thereof, by experienced and faithful deputies, of all the swamp lands therein which are subject to overflow and unfit for cultivation; and a list of the same to be made out, and certified by the deputies and surveyor-general, to the Secretary \* \* \*, who shall approve the same, so far as they are not claimed or held by individuals; and on that approval, the fee simple to said lands shall vest in the said State of Louisiana, subject to the disposal of the legislature thereof: \* \* \*."

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the claims of Louisiana to the swamp and overflowed lands may be allowed under either the special act of 1849 or the general act of 1850. *Work v. Louisiana*, 269 U.S. 250, 252 (1925). Aside from later acts, such as the 1857 act, *supra*, which confirmed title or otherwise purported to convey the fee, these two acts themselves are different in their wording as to when fee simple title is deemed to pass to the State. Under the 1849 act it is when the selection is approved by the Secretary, but under the 1850 act it is upon issuance of a patent to the State. The acts, however, are similar enough, and have been considered on a parity enough in court and departmental decisions, so that decisions under either act have great weight in considering the effect of the other act.

Although the State of Louisiana filed its selection under the 1849 act and requests the issuance of a patent, a patent is not necessary under that act to convey the State's title. Nevertheless, in addition to the approval of a selection under that act, a patent may be issued to furnish evidence of the State's title. Since filing its new selection application, the State has made no assertion that the fee simple title to the lot has ever passed to it under the 1849 or 1850 act. It claims only an equitable right or title and acknowledges that the legal title is in the United States.

The appellants, in contending that the decision below is erroneous, rely on certain actions taken concerning lot 6. They cite the State's Exhibit H presented at the hearing, which is a tract book record of the State of Louisiana, claiming it shows that lot 6 was entered on June 29, 1848, under the Internal Improvement Act of 1841, 5 Stat. 455 (subsequently enacted with some minor changes as §§ 2378 and 2379 of the Revised Statutes (1875), 43 U.S.C. § 857 (1964))\* in the land office in Louisiana, with Internal Improvement Warrant 361 issued by the State to Samuel Russell Rice. Clear list 6(B), dated March 26, 1850, and approved by the Secretary April 13, 1850, included the selection of Lot 6 (Contestees' Exhibit 2). This selection under the 1841 act, the appellants contend, rendered the land not subject to the

\* As worded during the time in question here (1848-1850), the act of September 4, 1841 (5 Stat. 455), provided in pertinent part as follows:

"Sec. 8. \* \* \* That there shall be granted to each State specified in the first section of this act [the States included Louisiana] five hundred thousand acres of land for purposes of internal improvement: *Provided*, that to each of the said States which has already received grants for said purposes, there is hereby granted no more than a quantity of land which shall, together with the amount such State has already received as aforesaid, make five hundred thousand acres, the selections in all of the said States, to be made within their limits respectively in such manner as the Legislatures thereof shall direct; and located in parcels conformably to sectional divisions and subdivisions, of not less than three hundred and twenty acres in any one location, on any public land except such as is or may be reserved from sale by any law of Congress or proclamation of the President of the United States, which said locations may be made at any time after the lands of the United States in said States respectively, shall have been surveyed according to existing laws. \* \* \*

Provision was also made in the act for a grant to new States as they were admitted into the Union.



swampland grant in 1849. The May 11, 1853, rejection of the 1850 swampland selection of this lot, mentioned previously, was stated on the rejection list (Contestees' Exhibit 3) to be for the reason that the lands "were sold and located prior to the passage of [the act of March 2, 1849]." There is no record that the State ever appealed from this action. The State, however, relies on the fact that in 1880 the State of Louisiana relinquished the land located by Samuel Russell Rice under Internal Improvement Warrant 361, which included lot 6 in question here, and another warrant (339),<sup>4</sup> and that the United States by the Commissioner of the General Land Office accepted this relinquishment by letter dated April 30, 1880 (Contestant's Exhibit G). There is no record that the State ever took any action thereafter to confirm or acquire title to lot 6 under the Swamp Land Acts until its action in 1962, which was after the oil and gas lease had been issued for many years and production had been obtained.

To show that the State did not take any action, the contestees at the hearing presented a letter dated September 30, 1939, from the Register of the State of Louisiana to attorneys representing them, in response to an inquiry as to the status of lot 6, stating that a letter from the Bureau of Land Management had reported the lot to be vacant United States land (Contestees' Exhibit 6). There was also testimony by an employee of the Trice Production Company that this letter was received before the company drilled wells in the unit area, and that the State's Department of Conservation authorized the creation of field units including the lot and the company expended over \$800,000 in drilling before knowing of any claim to the land by the State (Tr. 166-171).

The appellants' contentions may be summarized as follows: First, they contend that the rejection of the State's swampland selection in 1853 without any appeal being taken by the State is *res judicata* and that the selection made by the State in 1963 is, in effect, an attempt to appeal that action but is barred because of its untimeliness. Second, they contend that the decision below erred in holding that the lot was public land in 1849, because they insist that the selection under the Internal Improvement Act of 1841 was prior in time and appropriated the land, with full title going to the State in 1850 when the selection was approved, and relating back to 1848 when it was made, that no other action by the United States was needed to pass title to the State, and that the approval itself constituted a determination that the land

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<sup>4</sup> After the hearing the contestees' attorney by letter of May 22, 1964, transmitted to the hearing examiner a copy of the State's relinquishment executed by the Governor and Register of Louisiana on April 24, 1880, which states that Internal Improvement Warrants 361 and 339 had been withdrawn from the Land Department at Washington, D.C., by the legal heirs of Samuel Russell Rice because part of the approved location under such warrants had been previously disposed of by the United States. It does not state which of the located lands were in that category. The document states that the officials "transfer, remise and relinquish unto the United States" the lands located under the warrants.

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was subject to no other rights of the State of Louisiana and was a determination that the land approved was not subject to the Swamp Land Act. They contend that the State's subsequent relinquishment of the internal improvement selection did not affect the status of the land in 1849, that as the Swamp Land Act is a grant *in praesenti*, it operates only as of the date of its enactment, at which time the land was not available. Third, they contend that the decision erred in failing to hold that the State was estopped to claim rights to the land in question under the Swamp Land Act of 1849, legally because it had already accepted title to the land under a different act, and equitably because the appellants have made extensive expenditures in reliance upon information from the State and because the State had failed to claim the land as swampland for more than eighty years after it relinquished its title under the Internal Improvement Act. Fourth, they contend that the decision erred in finding that the State sustained its burden of proving the swampland character of the land as of 1849.

The State in response relies on the Bureau's decision and adopts its brief filed with the Director. In that brief it discussed the evidence at the hearing and asserts that it adequately proved the swampland character of the land. It contends that the only issue which was properly raised at the hearing and which can be considered by this Department is the factual question of the character of the land. Therefore, it contends that the legal issues raised by appellants may not be entertained but can be considered, if at all, only in a judicial proceeding. It suggests that the legal issues were not raised by the appellants prior to the hearing, and thus their consideration thereafter is precluded. In response to the legal arguments, it asserts that *res judicata* is not applicable because nothing in the Swamp Land Act precludes it from filing another selection. It suggests also that the internal improvement warrant was not located properly, although it does not explain why, and then contends alternatively that the land was public land in 1849 because the warrant was not approved until 1850, and that, in any event, in 1880 upon relinquishment of the State's claim under the act of 1841, the land was no longer burdened by the effects of the location warrant and title to the land reverted to the United States to the condition or status it was in before the warrant was approved, and thus a new selection could be made under the Swamp Land Act. It denies any equities in the appellants against the State, claiming that they should have been on notice that the land was swampland, and it asserts that it has equities because of the revenues which can inure to the State from the lot.

We consider first the State's contention that this Department is limited in its consideration of the State's selection to the factual question of the character of the land. The State cites no authority for

this proposition other than Bureau decisions calling for hearings as to the character of land in oil and gas leases when a State selection application is filed. The fact that these decisions and those cited by the Bureau in ordering the State to proceed in this case required a hearing on the characteristics of the land did not limit the scope of inquiry which could be made, but simply established the minimum that the State must show in order to prevail over the oil and gas leases. Clearly, if the facts established that the land was not swamp-land in character, there would be no reason to consider other questions which might affect the validity of the State's claim.

The next issue to be considered in this case pertains to the status of the lot at the date of the Swamp Land Act of 1849 and also the act of 1850. From the facts shown in the record this depends upon what effect should be given to the internal improvement selection filed in 1848. There has been no denial by the State that the selection was filed in the proper United States office prior to the Swamp Land Acts, but it states that the approval of the selection was not given until after the 1849 act. It also states that neither Rice nor his successors in interest ever acquired a State patent, and implies it is because the State would not have been authorized to issue one which would have passed title in any event. However, this may be, it does not matter whether the locator under the warrant ever obtained a State patent since the problem here is not whether individuals ever acquired title from the State, but whether the State ever acquired any title or right against the United States which should be considered as precluding a grant to it under the Swamp Land Acts.

The act of September 4, 1841, *supra*, did not expressly state that it conveyed fee simple title nor did it provide for the issuance of patents by the United States, although the language "shall be granted" would imply the passage of title at some time. By an act of August 3, 1854, 10 Stat. 346, subsequently enacted as Rev. Stat. § 2449 (1875), 43 U.S.C. § 859 (1964), it was provided that where lands had been or would be granted by any act of Congress to any State and the act did not convey the fee simple title to the lands, or require patents to be issued therefor, the list of such lands which had been or would be certified by the Commissioner of the General Land Office (later the Secretary of Interior) or his delegate, as originals or copies of the originals or records would be regarded as conveying the fee simple of all the lands embraced in such lists that were of the character contemplated by the act of Congress and intended to be granted thereby. List 6(B) apparently was such a list despite the statement in the decision below that no clear list had ever issued for the selection. Two cases decided after the passage of the 1854 act held that in conflicts between selectors for States under the 1841 act and settlers claiming under other acts the better right to the land is determined by which party took the initiatory

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step; if followed up by a patent that right relates back to the date of the initiatory act and cuts off all intervening claimants. *Shepley v. Cowan*, 91 U.S. 330, 337 (1875); *McCreery v. Haskell*, 119 U.S. 327 (1886). The *McCreery* case cited Rev. Stat. § 2449 as embodying the 1854 act.

However, even prior to the 1854 act, the position of this Department was that the priority of right and effect of a selection under the 1841 act are dependent upon when the selection is filed, and that conflicts would be settled upon the basis of priority of filing. See Instructions issued to the United States Registers from the Commissioner of the General Land Office in a circular dated August 6, 1847, 1 Lester Land Laws 501 (No. 545, 1882). In a later Supreme Court case it was stated with respect to the 1841 act that although the selections were to be made in a manner provided by the legislature of the States to which it applied, "such selections were subject to the approval of the land department of the United States, but when so made and approved the lands were to be certified to the State, and such certification was to have all the effect of a patent." *Deweese v. Reinhard*, 165 U.S. 386, 390 (1897). To the same effect, *Ison v. Nelson Min. Co.*, 47 Fed. 199 (C.C.D. Ore. 1891). It is clear, therefore, that the selection in behalf of a State under the 1841 act was considered to be an appropriation of the land which would have the effect of invalidating any subsequent selection, claim, or grant under any acts of Congress when approved by the Secretary.

The Department early took this position in considering conflicts between selections in behalf of States under the 1841 act and the Swamp Land Acts. Thus, the Secretary advised the Commissioner of the General Land Office that:

If the selection as a part of the grant by the Act of 1841, was made and certified to your office, or the local land office, prior to the 28th September, 1850, I will on being so advised, approve the selections. If, however, such selection has been made since the grant of September 28, 1850, the internal improvement selections will be suspended, until the swamp selection is passed upon, and then such as are rejected as swamp lands, may be submitted for approval, as selections under the Act of September 4, 1841. 1 Lester Land Laws 568 (No. 598, 1859).

The determining fact is whether or not the selection under the 1841 act was made before the conflicting grant under the Swamp Lands Act. The State and its locator could do no more to perfect title to the selected land than to file the selection with the appropriate office of the General Land Office. As admitted by the State here (see the testimony of its employee Tr. 131-133), the only act to be performed by the United States was to approve the selection and certify it to the State. This it did in 1850.

This case is similar to *Culver v. Uthe*, 133 U.S. 655 (1890). A mil-

itary land warrant was located in behalf of Uthe, the warrantor in that case, and filed in the land office  $21\frac{1}{2}$  months before passage of the Swamp Land Act of 1850. Patent was not issued under the warrant until 1851. The land was swampland. The court said that the warrantor by locating the land with the land office, giving up his warrant and receiving certificate of the receiver and register of the land office did all he could and thus acquired an equitable vested interest in the land. The only act left for the Commissioner of the General Land Office was to determine whether or not the land had already been granted. The Court, at 659, then makes an interesting statement:

Are we to suppose that Congress intended to give to the State of Illinois the land which it had already, by a contract for which value was received, promise to convey to Uthe? As the grant to the States of the swamp land within their jurisdiction was a gratuity, although accompanied with a trust for the reclamation of said land, it is not easily to be supposed that Congress intended to be thus generous at the expense of parties who had invested rights in any of the lands so donated, derived from the United States.

The court concluded that the land was excepted from the Swamp Land Act. Likewise, in considering whether Congress under the general Swamp Land Act intended to convey lands which would otherwise go to States under school grants passed prior to the Swamp Land Act, except that title would not pass until the land was surveyed—after the passage of the Swamp Land Act—it has been generally held in this Department that the unsurveyed school sections swamp in character pass to the State, if at all, under the school grant, and not the swamp land grant. *State of Wisconsin*, 66 I.D. 136 (1959); *State of Florida*, 38 L.D. 350 (1909). These cases decided that Congress did not intend to convey the lands which it had previously declared to be granted to the State for one purpose, to the State under a different act for another purpose. This reasoning seems equally applicable to the grant under the act of 1841. We must conclude, under the rules long followed in this Department and in the Courts, that where a right, such as obtained by the filing of a selection under the act of 1841, is acquired before a subsequent grant and is approved thereafter, it shall be considered as an appropriation of the land precluding the vesting of any rights under the subsequent grant at that time.

The State implies that there may have been no appropriation of the land under the internal improvement warrant because it was defective. It does not show why the warrant or the selection may have been defective, other than to point to the fact that the warrants were later surrendered and the State relinquished its claim to all the land selected under them. This is certainly insufficient. Indeed, the evidence suggests that perhaps the warrants were improperly surrendered back to the warrantors by the United States. Even if the warrant was improperly located as to some land, this did not mean that the selection

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under it as to other land was improper and ineffectual. The record shows no basis for concluding that there was no appropriation under the internal improvement selection.

We cannot agree with the State that the relinquishment by it in 1880 of its title or claim under the act of 1841 removed all the obstacles and burdens preventing the swampland grant from taking immediate effect and that there is nothing to prevent the State from now claiming the land under the Swamp Land Act. The State is somewhat inconsistent because it contends that the Swamp Land Act was a grant *in praesenti* creating a vested inchoate right on the land. If the grant is one *in praesenti*, as has been held by the courts, it would follow that it would take effect, if at all, when it was made, and that the appropriation of the land by the State at that time under some other law would cause the grant to fail as to that land. Nevertheless, the State asserts that under the Swamp Land Acts the United States has made a "continuing promise" to patent the land to the State, following survey, selection and identification, citing as authority for the quotation, *United States v. Minnesota, supra*. We see no language in that case of a "continuing promise," although the Court did state at 211, with respect to arguments that Minnesota should have made its selection earlier in order to preserve its rights, that by electing to abide by the field notes of the survey the State could be considered as making "a continuing selection \* \* \* of all lands thus shown to be swampy." This language simply made it clear that the State would not be held to any definite time for filing its selections in the land office when it had agreed to be bound by the field notes of the survey in determining what land was swampland.<sup>5</sup> This does not mean, as the State suggests here, that the State's right to make selections is continuous regardless of the status of the lands at the time of the grant. Indeed, the case demonstrates that it is the land status *at the time of the grant* that is determinative as to whether land was granted to a State by the Swamp Land Act. Thus, it held that the act of March 12, 1860, *supra* fn. 5, was not applicable to lands which were within Indian reservations at the date of the act but which were later ceded to the United States. The Court emphasized (at 206) that the grant being one *in praesenti* "was restricted to lands which were then public" and that this restriction was implied from the familiar rule:

\* \* \* that lands which have been appropriated or reserved for a lawful purpose are not public and are to be regarded as impliedly excepted from sub-

<sup>5</sup> The swampland grant made by the 1850 act was extended to the States of Minnesota and Oregon by the act of March 12, 1860, 12 Stat. 3. Unlike the 1850 act the 1860 act required selections of lands already surveyed to be made within 2 years after adjournment of the legislature of each State at its next session after the date of the act. A similar provision was made for lands thereafter surveyed. The discussion in the case was as to whether Minnesota's selections were too late.

sequent laws, grants and disposals which do not specially disclose a purpose to include them. \* \* \*

The Court also in discussing the effect of the swampland grant cited an earlier case which demonstrates that the applicability of the grant is determined by the facts in existence as of the date of the act, saying (at 203):

A case of special interest here is *Rice v. Sioux City & St. Paul R.R. Co.*, 110 U.S. 695. The question there was whether the Act of 1850 operated, when Minnesota became a State in 1858, to grant to her the swamp lands therein. The Court answered in the negative, saying that the Act of 1850 "operated as a grant *in praesenti* to the States then in existence," that it "was to operate upon existing things, and with reference to an existing state of facts," that it "was to take effect at once, between an existing grantor and several separate existing grantees," and that as Minnesota was not then a State the Act made no grant to her.

It is clear from the *Rice* case, *supra*, then that the grantee had to be in legal existence at the date of the Swamp Land Act for it to have benefitted from the grant and that the subsequent achievement of statehood did not entitle a new State to the grant. A corollary to this would be that the land must have been in such a status that it could pass immediately under the grant and that, if it was not, the fact that it subsequently became land subject to disposal would not bring it within the grant. This is clear from the language of the Supreme Court in *United States v. O'Donnell*, 303 U.S. 501, 510 (1938), where the Court stated as follows:

It is a familiar principle of public land law that statutes providing generally for disposal of the public domain are inapplicable to lands which are not unqualifiedly subject to sale and disposition because they have been appropriated to some other purpose \* \* \*. This has been held to be the case even though the appropriation be afterwards set aside. \* \* \* The general words of the granting act are to be read as subject to such exception.

This principle was applied in a Departmental decision which considered a swamp selection under the 1849 and 1850 acts, *State of Louisiana*, 33 L.D. 13 (1904). At the dates of the acts the land was within a military reservation; however, the selection was made after the reservation had been abandoned by the United States. The decision (p. 20) stated that the swampland grants:

\* \* \* were *in praesenti* and operated as of their respective dates, if at all, to transfer the equitable title to such lands. The identification of the lands and the transfer of the legal title were mere matters of administration, which could not either enlarge or diminish the grant. If, then, it was the intention of Congress to grant lands having such status, the equitable title passed immediately, and the State was entitled to the possession at once and to the legal title in due course of administration without regard to the fact that they were being used for the military purposes of the Government. In the case now under consideration it meant the abandonment of the reservation by the military authorities.

It is not doubted that Congress might have passed the title to swamp and overflowed lands within a military reservation subject to governmental use and

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occupation. \* \* \* but there is no intention manifested in the acts of 1849 and 1850 to pass the title in lands reserved for any purpose.

The decision held that the grant was defeated by the existence of the reservation on the dates of the 1849 and 1850 acts.

The Supreme Court upheld this conclusion in *Louisiana v. Garfield*, 211 U.S. 70 (1908), when the State sued to prevent the Secretary from disposing of the lands under other public land laws and to establish its title to the lands as swamplands. Answering the contention of the State that the Department had previously approved its selection of the lands under the 1849 act, the Court said:

\* \* \* The approval proceeded upon a manifest mistake of law; that upon the abandonment of the military reservation the land fell within the terms of the grant of 1849. Therefore it was void upon its face. (77.)

The case is significant inasmuch as the United States was proposing to convey the disputed land to others after the land was returned to the public domain rather than approving the grant to the State under the Swamp Land Act. The principle of the case, that land which is not subject to the swampland grants on the dates of the grants because of a reservation or appropriation does not become subject to the grants at a later date when the reservation or appropriation terminates, is applicable here.

We may note that since the legal title is in the United States and the United States retains an interest in the land and its minerals under the oil and gas lease, it has an interest to protect here. It is a principle of long standing that land grants are to be construed favorably to the United States and that nothing passes under grants from the United States except what is clearly conveyed and any doubts as to the extent of the grant are resolved in favor of the United States. *Caldwell v. United States*, 250 U.S. 14, 20-21 (1919), *United States v. Union Pacific R. Co.*, 353 U.S. 112, 116 (1957). This principle has long been applied in favor of the United States and against States receiving grants. *Leavenworth, and Galveston R.R. Co. v. United States*, 92 U.S. 733, 741, 746 (1875). Thus, if there were any doubts as to the application of the Swamp Land Acts to the land here, it should be resolved in favor of the United States.

We must conclude that although strict legal title to the land in question was in the United States in 1849, the equitable rights to the land had been established by that time under the act of 1841, and therefore the decision below was in error in concluding that there was nothing in the status of the lands which would preclude the grant under the Swamp Land Act from attaching with title relating back to the date of the act, and in concluding that the State's selection made after the relinquishment in 1880 could be accepted.



It is unnecessary to consider the contentions as to *res judicata* or estoppel or other points raised by the parties.

Accordingly, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A (4) (a) ; 24 F.R. 1348), the decision appealed from is reversed.

ERNEST F. HOM,  
*Assistant Solicitor.*

## THE GREAT AMERICAN INDEMNITY COMPANY OF NEW YORK

A-30533

*Decided May 19, 1966*

### Coal Leases and Permits: Generally

Where a coal lessee is informed by the Bureau of Land Management that his failure to pay an amount due the United States as rental within a stated period of time will result in the institution of suit to cancel the lease and to collect all money due thereunder, and payment is not made within the specified time limit, but is made almost entirely a few months later the failure of the Bureau to institute suit does not act as an extension of time which will release a surety under the lease from its obligation to perform according to the terms of its bond.

### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The Great American Indemnity Company of New York has appealed to the Secretary of the Interior from a decision dated July 13, 1965, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed a decision of the Utah Land office calling upon it, as surety under coal lease Utah 010581, issued to Lloyd D. Sutton, to pay the sum of \$4,575, in which amount the lessee was in default in the payment of rental under the lease.<sup>1</sup>

The record shows that the lease was issued to Sutton, effective February 1, 1956, for 1,682.39 acres of land in secs. 5, 6, 7, 8, 9 and 17, T. 13 S., R. 11 E., S.L.M., Utah. Prior thereto, on January 16, 1956, the appellant executed its bond in the amount of \$5,000 as surety under the lease. The record further shows that on January 6, 1956, a protest against the issuance of a lease to Sutton was filed by the Independent Coal & Coke Company. The protest was finally disposed of on March 6, 1958, when the Director, Bureau of Land Management, affirmed the dismissal of the protest by the land office. In the meantime, on April 19, 1957, the land office, in response to a request by Sutton, deferred the minimum expenditure requirements of the lease for the second year until such time as the matter of the protest should be resolved. Thereafter, by a letter dated April 26, 1960, the Deputy

<sup>1</sup> The decision of the Office of Appeals and Hearings also affirmed land office decisions requiring payment by the sureties under two other coal leases held by Sutton. Appeals to the Secretary by those sureties were dismissed by the Department on October 4, 1965 (*Fannon Shimmin and Belmont Richards*, A-30533-a).

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Regional Mining Supervisor, Geological Survey, advised Sutton that he would have three years from March 6, 1958 (the date of the Director's decision affirming dismissal of the protest), to complete the minimum expenditure requirements of his lease.

By a decision dated September 14, 1960, and approved by the Assistant Secretary of the Interior on January 3, 1961, the Director, Bureau of Land Management, revoked the land office decision of April 19, 1957, holding that the manager of the land office had no authority to defer the expenditure requirements of the lease and that the statements of the Regional Mining Supervisor in his letter of April 26, 1960, regarding the minimum expenditure requirement, which were apparently based on the land office decision, were in error. The Director also denied a request of the lessee that the effective date of the lease be moved from February 1, 1956, to March 6, 1958. He noted, however, that the lessee apparently had expended \$75,416.35 on or for the benefit of the leased lands and stated:

If this is true, the lessee may, in the interest of the United States, be permitted to make the balance of the expenditures required under section 2 (a) of the lease on or before June 1, 1961, provided within 30 days from receipt of this decision, he submits to the Director, Bureau of Land Management, Washington, D.C. consent thereto by the Great American Surety Company surety on the \$5,000 lease bond, and the surety's agreement to remain bound under the bond, or a new and satisfactory bond in the same amount. A form of such consent is attached.

The lessee is also required within the 30-day period to pay the amount shown herein to be due as rental and as royalty on minimum production to the Regional Mining Supervisor, Geological Survey, 457 Federal Building, Salt Lake City, Utah; and advise this office that such payment has been made. Failure to comply with this decision within the time allowed will result in institution of suit to cancel the lease and to collect all money due thereunder. \* \* \*

In a decision dated July 20, 1961, the Assistant Secretary determined, upon review of the case, that there was good reason to grant relief and that such relief would encourage development and would be advantageous to the United States and to the lessee. He, therefore, waived the minimum production requirements of the lease for the fourth and fifth lease years ended January 31, 1960 and 1961, respectively, subject to the payment of the balance then due as rental, amounting to \$2,426, and he revoked the decision of September 14, 1960; to the extent that it required the lessee to pay the full amount specified therein. The decision also provided that:

Unless the lessee pays the rental, amounting to \$2,426, to the Regional Mining Supervisor specified in the above-mentioned decision on or before August 1, 1961, we will have no alternative but to take appropriate legal action with a view to the cancellation of the lease and the collection of all money due thereunder. \* \* \*

In October 1964, the Department learned that the lessee had apparently abandoned the leased area and that his whereabouts were unknown. By a decision dated November 5, 1964, the land office made

demand upon the appellant for the amount of the rental in which the lessee was then in default.

The appellant appealed to the Director, Bureau of Land Management, asserting that:

- (1) Timely notice of the lessee's default was not given to the surety;
- (2) The lease was assigned to the Small Business Administration in the early spring of 1963, and obligations under the lease were imposed on the Small Business Administration, and Sutton was relieved of the obligation to pay rent and/or royalty because of the assignment;
- (3) Since no suit was filed to cancel the lease in accordance with the terms of the decision of September 14, 1960, the Bureau of Land Management should now be estopped from demanding and collecting payment from the surety.

The Office of Appeals and Hearings, in affirming the action of the land office, held that a creditor may proceed against a surety notwithstanding lack of diligence, demand, or suit against the principal. It further noted that there was no evidence that the assignment of the lease had been submitted to the Bureau by the Small Business Administration for approval as required by the Department's regulation, and it held that in the absence of the approval of the assignment by the Secretary of the Interior the lessee and his surety remained bound to comply with the terms of the lease.

In its present appeal Great American contends that an extension of time was given to Sutton under his lease without the consent of the surety which resulted in material harm to the surety company, thereby relieving it of all responsibility under its bond. It cites the language of the Bureau's decision of September 14, 1960, *supra*, asserting that no money was paid by the lessee to the United States Government pursuant to the decision and that there is no record of any suit being filed by the Government to cancel the lease or to collect the money due thereunder. It follows, the appellant argues, that the Government granted the lessee an extension of time in which to make the required payment. It further contends that the authorities unanimously hold that if there is an extension of time a surety will be relieved from its obligation where it has been made to suffer material harm, citing 50 Am. Jur., Suretyship, § 322.<sup>2</sup> It asserts that the Government recognized that the extension granted to Sutton was a material alteration of the lease agreement, because the decision specifically stated that within 30 days from receipt thereof the lessee was to submit to the Director, Bureau of Land Management, consent

<sup>2</sup> The cited authority states in part that:

"In accordance with the rule that a surety company can be relieved from its obligation for suretyship only where a departure from the contract is shown to be a material variance, it is held that an extension of time will not relieve a surety company on a bond unless the extension exceeds the time limited in the bond for bringing suit thereon, or unless the surety company is thereby made to suffer material harm; and that there will be no presumption of injury unless injury is alleged and proved. \* \* \*"

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thereto by the Great American Surety Company and the surety's agreement to remain bound under the bond or a new and satisfactory bond in the same amount, and that no agreement was ever obtained from the surety company to remain under the bond.

While the appellant's contention with respect to the effect of an extension of time granted to the principal debtor without the consent of the surety appears to be correct where applicable, the authority cited by the appellant also states that:

An extension of time to the principal, if it is to effect a release of the surety, must be the result of an obligatory contract, made on a valid consideration, and without the surety's consent. \* \* \* 50 Am. Jur., Suretyship, § 72.

\* \* \* Mere forbearance or passive inactivity without any agreement will not discharge the surety, because there is nothing to prevent the creditor from proceeding against the principal at any time. It is the duty of the surety, as well as the principal, to see to the payment of the money, and the forbearance of the creditor is a tacit indulgence given to both. Leniency shown to a debtor in default by delay permitted by the creditor without a change in the time when the debt might be demanded does not constitute an extension of the time of payment. That requires a binding contract which precludes the creditor from enforcing payment according to the terms of the original contract and confers upon the debtor the right to withhold payment after the original debt has become due. \* \* \* Where the essential features of the contract and its objects are preserved, and the parties, without objection from the surety and without any legal constraint on themselves, mutually accommodate each other, so as better to arrive at their end, there is no ground for the surety to complain. 50 Am. Jur., Suretyship, § 65.

To operate as a discharge of the surety, the creditor's agreement to extend the time of payment or performance by the principal must be a positive, binding agreement, possessing all the essentials of a valid enforceable contract, supported by a sufficient consideration, and in the proper form. \* \* \* 50 Am. Jur., Suretyship, § 60.

It is readily apparent that the failure of the Bureau of Land Management to initiate proceedings against the lessee at the expiration of the 30-day period provided for in the decision of September 14, 1960, cannot be construed as the granting of an extension of time, as the appellant would have it. It was, plainly and simply, a forbearance to sue which afforded the surety no basis for relief from its obligations under the bond. The Bureau, however, was not in any way limited by such forbearance in its right to institute suit at any time thereafter that it might see fit.

We come then to the question of the effect of the requirement in that same decision that the lessee obtain the surety's consent to remain bound under the bond. The decision proposed an extension from February 1, 1959, to June 1, 1961, of the time limit in which the lessee was permitted to make the expenditures required under the terms of the lease. That extension would have been a material variance in the terms of the lease and conceivably could have resulted in injury to the

surety. It is not necessary, however, to determine whether or not, in fact, the extension would have required the consent of the surety in order to keep the bond in force, for the granting of the extension was conditioned upon the surety's consenting to remain bound under the bond. Since the surety never gave its consent, the proffered extension never took effect, and the terms of the lease under which the surety was obligated remained unchanged.<sup>3</sup>

The subsequent waiver by the Department of the minimum production requirements for the fourth and fifth years and later years, of course, resulted in a direct benefit to the surety, and the appellant cannot possibly be heard to complain of this.

Finally, we must determine whether or not the Bureau had a duty to the surety to proceed against the lessee at some time before it learned of the abandonment of the lease in 1964 or if it had a duty, at least, to notify the surety of the principal's default. From the information contained in the record it appears that the status of the lessee's rental account between February 1, 1958, and February 1, 1964, was as follows:

Annual Rental Due		Total Amount Due at Beginning of Lease Year	Payments		Balance Due at End of Lease Year
2/1/58-----	\$841. 50	\$841. 50	2/3/58-----	\$841. 50	\$00. 00
2/1/59-----	841. 50	841. 50	1/26/59-----	420. 00	421. 50
			10/7/59-----	420. 00	1. 50
2/1/60-----	841. 50	843. 00	2/1/60-----	100. 00	743. 00
2/1/61-----	1, 683. 00	2, 426. 00	9/19/61-----	1, 200. 00	1, 226. 00
			10/19/61-----	1, 200. 00	26. 00
2/1/62-----	1, 683. 00	1, 709. 00			1, 709. 00
2/1/63-----	1, 683. 00	3, 392. 00	8/16/63-----	500. 00	2, 892. 00
2/1/64-----	1, 683. 00	4, 575. 00			4, 575. 00

Thus, after February 1, 1959, the lessee's account was always in arrears to some degree, although the lessee made consistent efforts to pay the balance and made progress in some years until February 1, 1962, after which time the default became progressively worse. Most striking is the fact that at the end of the lease year beginning Feb-

<sup>3</sup> In a letter dated February 3, 1961, to the Bureau of Land Management, the appellant wrote:

"In connection with the above captioned matter, we are in receipt of a Consent and Agreement to a proposed arrangement for further payments for the lease which is the subject of our bond.

"We have been informed that our principal, Lloyd D. Sutton, through his attorney, is protesting the decision of the Director of the Board of Land Management, and is requesting a further review of the matter. Under the circumstances, he is not fulfilling the agreement as proposed at this time, and consequently, there is nothing to which this Company, as surety, can consent."

In any event it appears that the required minimum expenditures were made on or before June 1, 1961, or before the date of the Department's decision of July 20, 1961.

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ruary 1, 1961, the lessee's account was in arrears only by \$26. In other words, the lessee, who was obligated under the decisions approved on January 3, 1961, as amended by the decision of July 20, 1961 to pay \$2,426, the total amount then due on the lease, by August 1, 1961, paid \$1,200 on September 19 and another \$1,200 on October 19, leaving a balance of only \$26. The appellant was served with copies of both decisions and was thus aware that the requirements of the first decision had been substantially modified to the lessee's benefit. It cannot be seriously contended that the United States was bound to take action on the lease for such a slight delay and such a small deficit.

Thus, at least until the end of the lease year commencing February 1, 1962, during which no rental payment was made, there appears to have been a rational basis for the Bureau's continued forbearance and a reasonable possibility that the lessee might, with such forbearance, eventually meet his obligations under the terms of the lease.

The law which we find applicable here is stated as follows:

Except in so far as the creditor or obligee may be required in equity to proceed first against the principal \* \* \* the creditor owes the surety no duty of active diligence in proceeding against the principal, and mere want of diligence or forbearance will not affect the right of the creditor to pursue the surety, since the latter, at any time after default of the principal, is entitled to pay the debt and reimburse himself by enforcing it against the principal. The consequences of the delay, such as the subsequent insolvency of the principal, or the fact that remedies against the principal may be lost by lapse of time, are immaterial. \* \* \* 72 C.J.S. Principal and Surety, § 208.

Inasmuch as the creditor owes no duty of active diligence to take care of the interest of the surety, his mere failure voluntarily to give information to the surety of the default of the principal cannot have the effect of discharging the surety. The surety is bound to take notice of the principal's default and to perform the obligation. He cannot complain that the creditor has not notified him, in the absence of a special agreement to that effect in the contract of suretyship. \* \* \* 50 Am. Jur., Suretyship, § 42.

\* \* \* A creditor is under no obligation in so far as the surety is concerned to be actively diligent in pursuit of the principal, unless the surety requires him by appropriate notice to sue on the obligation. If the surety is dissatisfied with the degree of activity displayed by the creditor in the pursuit of his principal, he is not without a remedy. He may pay the debt himself and become subrogated to all the rights and remedies of the creditor. Although a creditor's forbearance to sue is presumed to be for the benefit of both surety and principal, such forbearance will not discharge the surety, notwithstanding it may, in fact, be prejudicial to him, for, it has been said, it is his peculiar business to judge of the danger to be apprehended from delay, and to quicken the creditor, where the occasion requires it, in the way known to the law, in default of which the loss incurred is necessarily to be attributed to his own supineness. \* \* \* 50 Am. Jur., Suretyship, § 79.

Apart from the fact that the Bureau had no obligation to notify the appellant of the lessee's default, the record shows that the appellant had sufficient notice so that it should have been fully aware of that default. The appellant received a copy of the Assistant Secretary's

decision of July 20, 1961, from which it should have learned (1) that no action had been taken to collect the amount stated to be due in the decision of September 14, 1960, or to cancel the lease, (2) that the lessee had made no payments between the dates of the two decisions, and (3) that the lessee was currently in default in its rental payments in the amount of \$2,426. Moreover, the record shows that each year from 1961 to 1964 the lessee requested and was granted a suspension of minimum production and royalty requirements under the lease. In each of those years the surety was advised of and consented to the suspension. In view of these facts, there is no plausible excuse for the appellant's failure to keep itself fully informed of the status of the lessee's account.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A (4) (a) ; 24 F.R. 1348), the decision appealed from is affirmed.

ERNEST F. HOM,  
*Assistant Solicitor.*

### CHRISTIAN E. WICKS

A-30480

*Decided May 31, 1966*

#### Mining Occupancy Act: Qualified Applicant

A qualified applicant for conveyance of land under the act of October 23, 1962, must have been, on that date, a residential occupant-owner of valuable improvements in an unpatented mining claim which constituted for him a principal place of residence, and an application is properly rejected where it appears that the applicant's use of the land applied for has been limited to approximately four months' occupancy per year and there is no evidence that weather or topography or other factor made it practically impossible for him to use the site as a residence during the remaining eight months but, on the contrary, the evidence shows that during the eight months the applicant lived as a matter of choice with his children away from the claim.

#### Mining Occupancy Act: Principal Place of Residence

The term "valuable improvements" which constitute "a principal place of residence," as used in section 2 of the act of October 23, 1962, must include a presently habitable dwelling place, and this requirement is not satisfied by a one-room cabin which lacks all of the conveniences normally associated with residence, including plumbing and electricity, and is suitable only as a shelter from the elements.

#### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Christian E. Wicks has appealed to the Secretary of the Interior from a decision dated March 11, 1965, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed a decision of the Sacramento, California, land office rejecting his application, Sacra-

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mento 078735, filed pursuant to the act of October 23, 1962, 76 Stat. 1127, 30 U.S.C. §§ 701-709 (1964), to purchase a tract of land in lot 5, sec. 1 T. 14 N., R. 9. E., M.D. Mer., California, and denying his petition to have vacated a decision declaring null and void *ab initio* a mining claim of which the land applied for was a part.

The land applied for was included in the Prosperity lode mining claim, located on September 24, 1932, by Blanche M. Wicks, and relocated by the appellant on October 3, 1955. By a decision dated February 27, 1963, the land office declared the claim null and void *ab initio* for the reasons that at the time of the original location the land embraced in the claim was included in Power Site Reserve No. 201, effective August 30, 1911, and Power Project No. 334, effective August 22, 1922, and was not open to mining location, and that on the date of the relocation the land was included in a first form reclamation withdrawal. No appeal was taken from that decision and it has become final.<sup>1</sup>

The appellant stated in his application that he first built on the land in 1933 and that, while prospecting, he lived upon the land with other members of his family for much of the time throughout the more than 30 years since 1932. He stated that there are now improvements upon the land consisting of a 20' x 30' log cabin having a replacement value of \$6,000, and a patio, bridge, outhouse and road, with a combined replacement value of \$1,300.

The land office rejected the appellant's application upon findings that the land applied for was not, on October 23, 1962, a principal place of residence for the appellant and that occupancy has been limited largely to occasional weekend and summer vacation use by members of the appellant's family. The findings of the land office were based principally upon a report of field investigation in which it was found that:

(1) A granddaughter of the appellant stated that her grandfather had lived with her family or with other children for years and that, to her knowledge, he had never spent more than short periods at the cabin;

(2) Neither the postmaster at Colfax, California, nor the mail carrier who delivered mail to residents in the vicinity of the appellant's cabin had ever heard of the appellant;

(3) The bank in Colfax had no record of the appellant;

(4) The Colfax District Ranger of the California Division of Forestry stated that he had seen the appellant at the cabin but that the

<sup>1</sup> In his present application the appellant petitioned the land office to vacate its decision of February 27, 1963, on the ground that the reclamation withdrawal affecting the land applied for was revoked prior to the relocation of the claim. The land office, however, found that the revocation of the withdrawal did not become effective until after the relocation of the claim, and it denied the appellant's petition. No appeal has been made from that part of the land office's decision.



appellant definitely had not lived there for any period of time and that, to the best of his knowledge, the cabin was most often used on weekends or at periods during the summer by married children of the appellant;

(5) The cabin is a one-room cabin with no plumbing or electricity and would ordinarily not be considered suitable for more than an occasional shelter; daylight showed through cracks in the unfinished walls in several places; the cabin contained five beds, including bunk beds, a table, a wood stove, chairs and rough cupboards;

(6) The appellant stated in a small tract application, filed on July 7, 1953, that he desired the tract for recreation purposes.

In his appeal to the Director, Bureau of Land Management, Wicks stated that during the period from July 23, 1955, to October 23, 1962, he spent approximately four months of each year at the cabin, that he spent approximately equal periods during the remaining eight months of each year with each of his children, and that the cabin is not only *a* principal place of residence for him, but it is *the* principal place of residence. He also stated that during the period from May 1960 through October 1964, he and his son, who was working in the vicinity, lived on the claim even during winter months, that during this period the claim was virtually a year-round residence for appellant.

In affirming the rejection of the application the Office of Appeals and Hearing found that the appellant's claimed occupancy was at variance with information obtained from impartial individuals employed or stationed in the area, that the appellant had submitted no documentary or other significant evidence in support of his assertions, and that, in addition, the record discloses that the cabin would be suited at best to casual or intermittent occupancy and that such occupancy is expressly excepted from favorable consideration.

In his appeal to the Secretary, Wicks attempts to explain away the evidence upon which the Bureau's decisions were based without denying the substance of all the findings set forth in the report of field investigation. He states, for example, that while it is true that the district ranger did see the appellant at his cabin a few times, the ranger had no way of knowing that when members of the appellant's family were at the cabin during the summer months they were simply visiting the appellant. He explains the fact that local post office personnel had not heard of him by stating that prior to 1949 he put up three separate mail boxes, each of which was knocked down, and that since that time he has used only general delivery at the Colfax post office when he was expecting something to be sent to him, that he has his social security checks sent to the address of a daughter in Napa, California, that during his residence at the cabin he uses public telephones in Colfax when it is necessary to communicate with anyone, and that

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there is so little reason for mail to be sent to him that it is not surprising that the present personnel of the post office have no recollection of him. He asserts that the cabin on the land he has applied for is the only home belonging exclusively to him, that it has been kept comfortable for him and for his guests and that he dares not leave anything of any great value either in or outside of the cabin even during short absences because of vandalism in the area. He has submitted with his appeal the statements of three of his children supporting his statements with respect to his use of the cabin and his regard for it as his only home.

One of the supporting witnesses, a daughter of the appellant, states that during the period July 23, 1955, through October 23, 1962, the appellant stayed with her "on visits" as follows:

1955—November 20—December 19

1956—March 10—June 19

1957—February 16—April 10, December 26—December 31

1958—January 1—February 10

1959—January 23—March 6, April 12—May 16

1960—January 3—April 19

1961—October 4—October 18

1962—June 23—June 25, July 14—July 19

She also states that: "As to the cabin being considered by the B.L.M. men as unsuitable for anything more than occasional shelter, my father happens to belong to the breed of men who needed only water, shelter and the wonderful freedom of living in his own home, no matter how crude."

Another witness, a son of the appellant, states:

From May 1960 through October 1964, I was engaged in construction work and the management of property at The Ponderosa, which is about 15 miles northwest of the land now applied for by my father under Sacramento 078735. During those years I lived in the house on my father's mining claim with him, even during the winter months—going and coming morning and night as working people, spending daytimes "on the job" and the nights in my father's own home with him. During these 4½ years the house on the claim was actually a *year-around* residence for my father and also for me except certain nights I spent in temporary quarters on the Ponderosa job when I had to be on that job without letup. During this time I spent only occasional weekends with my family in Sacramento, as it was my work to stay on The Ponderosa with practically no absences possible.

The third witness, the daughter living in Napa, states "that appellant spent from about the middle of October to the middle of November and sometimes through Thanksgiving and even to Christmastime with her from 1955 to 1965." She also mentions that the only summer he was absent for a period of months was in 1959 when he went to Norway from June 16 to Columbus Day.

Section 2 of the act of October 23, 1962, *supra*, defines a "qualified applicant" under the act as—

\* \* \* a residential occupant-owner, as of the date of enactment of this Act, of valuable improvements in an unpatented mining claim which constitute for him a principal place of residence and which he and his predecessors in interest were in possession of for not less than seven years prior to July 23, 1962.

In explaining the term "valuable improvements," as used in the act, the Senate Committee on Interior and Insular Affairs stated that:

The term "valuable improvements" is intended to include a presently habitable residence which has been used for this purpose, plus other accessory buildings incidental to residence, such as a tool shed, garage, barn, or chickenhouse presently fit for use. S. Rept. No. 1984, 87th Cong., 2d Sess. 7 (1962).

There is no precise legal definition of "habitable residence," but in order to be habitable a dwelling must be "reasonably fit for occupation." It may well be that the appellant is a hardy individual who finds contentment in retiring to a rustic cabin in the wilderness which others might disdain, but, in determining what constitutes "valuable improvements" for use as "a principal place of residence," the Department must have a more objective standard than the individual propensities of the various applicants for public land. Thus, the Department could hardly find that a lean-to constitutes a valuable improvement within the meaning of the statute although it might be sufficient shelter for a rugged outdoorsman with a sleeping bag.

Of course, appellant's improvements are not so primitive; however, the evidence in the record does not support a finding that his cabin is suitable for residential use or that it has, in fact, been used for that purpose, as the term is commonly understood and as Congress has indicated that it should be understood in connection with the act of October 23, 1962. On the contrary, the statements of the appellant and of members of his family tend to substantiate the Bureau's finding with respect to the nature of the improvements constructed upon the claim, that is, that they consist only of a one-room cabin with no amenities such as plumbing or electricity and with unfinished walls which permit the outside air to enter.

Be that as it may, under the act of October 23, 1962, the valuable improvements must constitute for the applicant "a principal place of residence" as of that date and must have been in the possession of the applicant or his predecessors in interest for not less than 7 years prior to July 23, 1962. What constitutes "a" principal place of residence? The legislative history of the statute is clear that the phrase does not mean "the" principal place of residence, that is, a qualified applicant can have more than one place of residence so long as the mining claim is a principal residence. This excludes a place used for casual or intermittent purposes, such as a hunting cabin or weekend residence.<sup>2</sup>

<sup>2</sup> See S. Rept. No. 1984, *supra*, 5-6; H. Rept. No. 2545, 87th Cong., 2d sess., 4 (1962); *Ola N. McCulloch Sibley*, 73 I.D. 53 (1966).

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Even though the statute permits the applicant to have a principal place of residence away from the claim, the legislative history suggests that the applicant is permitted to reside away from the claim only where full-time residence on the claim is impossible as a practical matter. Thus, the Senate committee referred to circumstances in which "climatic conditions make year-round residence impracticable" (S. Rept. No. 1984, *supra*, 5), and the House conferees, explaining the reason for choosing "a principal place of residence" rather than "the principal place of residence," stated that "[t]his is intended to avoid problems in which weather and topography make the site, though suitable for continuous occupancy for several months each year, impossible for the remainder of the time" (H. Rept. No. 2545, *supra*, 4).<sup>3</sup>

Appellant stated in his appeal to the Director that during the period July 23, 1955, through October 23, 1962, he lived on the claim each year approximately 4 months from June to October. He said he lived with his children the remaining 8 months. He did not and does not contend that residence on the claim was impracticable for 8 months because of climatic or topographic reasons. In fact, he cannot because he claims that he lived with his son on the claim practically continuously from May 1960 through October 1964. This negates any possible assertion of a physical bar to year-round residence on the claim.

In the Department's recent decision in *Ola N. McCulloch Sibley*, *supra*, fn. 2, it was held that where a physical ailment compelled an applicant to live for some time away from the claim and the evidence indicated that she did not intend to give up her claim as her principal place of residence, she would nevertheless be considered a qualified applicant under the statute. There are no similar or comparable circumstances here. The appellant lived away from his claim for most of the time each year apparently simply because he preferred to live with his children most of the time. In the face of the statutory language and history, we are unable to conclude that he occupied the cabin on his claim as a principal place of residence for the period required, at least during the period from July 23, 1955, to May 1960. Accordingly, the appellant's application was properly rejected.

Although appellant's application must be rejected, it appears that there is no objection to permitting the appellant to continue occupancy of his cabin until the land is required for other purposes. Accordingly, if appellant wishes to retain his occupancy of the cabin, he should apply for such privilege at the land office.<sup>4</sup>

<sup>3</sup> See *H. T. Grandell*, 72 I.D. 431, 434 (1965).

<sup>4</sup> It should be noted that even if an applicant is qualified under the act of October 23, 1962, the grant of any relief is entrusted to the discretion of the Secretary and he may determine the extent of any interest to be granted, up to and including a fee simple. The land that the appellant has applied for is required for the Auburn-Folsom Unit of the Central Valley Project so that in any event the Department would not have granted him more than a permit to occupy the land pending its use for reservoir and recreational purposes.

The appellant has filed with his statement of reasons in his appeal to the Secretary copies of a notice dated May 22, 1964, whereby the land office notified him that he would be assessed charges for the unauthorized use of the land which he occupies, and a letter dated February 18, 1965, which notified him that the amount due the United States for past unauthorized use of the land had been determined to be \$776. He requests that he be relieved of the obligation to pay this charge.

The appellant does not indicate whether he has appealed to the Director, Bureau of Land Management, from the assessment of trespass charges. If he has not, the time for filing such an appeal has passed (see 43 CFR 1842.4(a)), and the appellant cannot avoid the consequences of failure to file a timely appeal by appealing in this manner. In any event, the question is not properly before the Secretary at this time. To the extent to which the petition for relief from the obligation to pay for unauthorized use of the land may be considered as a part of the appellant's appeal from the adverse ruling on his application for the land which he occupies, the petition must be denied for the reasons already set forth.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A (4) (a) ; 24 F.R. 1348), the decision appealed from is affirmed.

EDWARD WEINBERG,  
*Deputy Solicitor.*

HOWARD C. BROWN

A-30536

*Decided May 31, 1966*

**Rights-of-Way: Generally—Rights-of-Way: Act of February 15, 1901—  
Water and Water Rights: Generally**

The Department will not deny an application for a right-of-way to transport water from a mill site for use on a mining claim upon the basis of a protest that the use of the water will deplete the underground water available to agricultural users of such water where it appears that under the water law of the State (California) the agricultural users have a remedy at law to protect their interests; the Department will not adjudicate the water rights of the parties.

**Mining Claims: Mill Sites**

The sinking of wells and the construction of substantial improvements for the conveyance and utilization of water therefrom in mining operations are sufficient to justify the use of the land as a mill site.

#### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Howard C. Brown has appealed to the Secretary of the Interior from a decision dated July 22, 1965, whereby the Office of Appeals and Hear-

*May 31, 1966*

ings, Bureau of Land Management, affirmed a decision of the Riverside, California, district and land office dismissing his protest against approval of an application for a right-of-way for a water pipeline and a power line filed by Kaiser Steel Corporation.

Kaiser filed its application Riverside 04763 on February 18, 1964, pursuant to the act of February 15, 1901, 31 Stat. 790, as amended, 43 U.S.C. § 959 (1964), and the applicable regulations in 43 CFR, subpart 2234, for advance permission to construct a water pipeline and an electric power line across public lands in Ts. 4 S., Rs. 14 and 15 E., S.B.M., California. The application stated that:

The facilities will be utilized for the purpose of supplying additional water to Applicant's Eagle Mountain Mine, Riverside County, California, which water is urgently needed now because the present water supply for said mine does not have sufficient capacity to furnish the amount of water which is needed. Because of lack of water, it has been necessary for Applicant to curtail its operations at said mine to less than scheduled. In addition, additional water is required to service an iron ore pelletizing plant and related plant which Applicant is in the process of constructing at said mine and expects to complete within approximately one and one-half years at a very large total investment. For these reasons, said facilities are urgently needed now and will be essential in the near future for the operation of Applicant's mine. \* \* \*

By a letter dated March 25, 1964, Kaiser was granted permission to proceed with construction at its own risk, subject to existing valid rights. The letter specified that the grant of advance permission was not a commitment that the application for right-of-way would be approved, that the permission granted was revocable at will, and that, unless otherwise extended, the advance permission would expire one year from the date of the letter.

On March 5, 1965, the appellant filed a protest against any renewal, extension or final approval of Kaiser's right-of-way application, asserting that:

1. Millsite Claim #6, and all other millsites used for extracting water from the Chuckwalla Water Basin, such millsites being located in Sec. 2, 10, 11 of T 4 S, R 15 E, S.B.B.M. Are protested because of improper millsite use. We further protest to any continuation of the use of these millsites and to any applications now pending or applied for, for the patenting of any of the millsites to be used solely for the purpose of extracting water from the water basin of the Chuckwalla Valley, if providing the waters extracted from the millsites are not used upon the millsites, but instead, the water transported out and away from the millsites to then be used on land which is not overlying land of the Chuckwalla Water Basin (required use of Millsites Circular 2149-3417.1).

2. Right-of-way (case R04763) is protested against any renewal, extension or final approval, because, no proof of ownership of the water being transported (43 CFR 2234.1-2 (d) (2) circular 2161 rights-of-way on public lands). As per Bureau of Land Managements' request of Kaiser Steel \* \* \*

By a decision dated April 7, 1965, the Riverside office dismissed the protest, holding that the sinking of wells and the construction of substantial improvements for the conveyance and utilization of water

from the land were sufficient to justify the entry of land as a mill-site. It also held that, while regulation 43 CFR 2234.1-2 (d) (2) requires a statement of the proper State official or other evidence of a right to appropriate water, the conveyance of water in this case involved the use and transportation of percolating ground water, for which no rights of use are granted by the State of California, and that no statement or evidence of right to use the water, therefore, would be required of Kaiser.

After considering appellant's arguments that the Kaiser millsites were not being used for mining or milling purposes, that Kaiser had not complied with the State requirements for the extraction of ground water and that public policy was not served by permitting Kaiser to remove water from the Chuckawalla Valley, the Office of Appeals and Hearings found that the well casings, pumps, switching house, and other equipment and improvements placed upon the millsites constituted substantial and permanent improvements which, coupled with Kaiser's need for the water for use in its mining operations, satisfied the requirements for a millsite, citing *Sierra Grande Mining Co. v. Crawford*, 11 L.D. 338 (1890), and *Ash Peak Mining Company*, 47 L.D. 580 (1920). It further found that literal compliance with the Department's requirement for a showing of water right was impossible but that the record showed that Kaiser had complied with the requirement of the California Water Code, § 5004, by filing notices of extraction of ground water within six months after the close of the previous calendar year and that this compliance was sufficient to satisfy the Department's regulations. The Office of Appeals and Hearings also noted the appellant's reference to the case of *Oscar O. H. Nelson et al.*, Los Angeles 0160613 etc. (September 17, 1959), approved by the Assistant Secretary of the Interior on September 25, 1959, which held that it would be against the public interest to allow further depletion of the already overdrawn water resources of Chuckawalla Valley by allowing additional desert land entries in the area. It distinguished between the two situations, however, upon the basis that in the *Nelson* case the Secretary exercised his authority under section 7 of the Taylor Grazing Act, 48 Stat. 1272 (1934), as amended, 43 U.S.C. § 315f (1964), to classify land as not suitable for agricultural entry when he determined that there was an insufficient supply of percolating water to permit the reclamation of additional entries but that the Secretary does not have authority to refuse to allow an entry for a millsite under the mining laws if the land involved is otherwise open to such entry. It found that the appellant's apprehension that the extraction of large quantities of water would further deplete the ground water table of the Chuckawalla Valley was at the heart of his protest and that he was asking the Department to determine that as between himself, as a user of percolating ground water for the benefit

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of his overlying land, and Kaiser, which is appropriating water to transport to other land outside the ground water basin, his rights were paramount. The Bureau concluded that the Department does not have jurisdiction to determine that question, citing *Silver Lake Power & Irrigation Co. v. City of Los Angeles*, 37 L.D. 152 (1908), and *Robert J. Edwards and J. C. Jamieson v. Oscar T. S. Sawyer*, 54 I.D. 144 (1933).

Brown asserts in his present appeal that he does not ask the Department to determine water rights but that he does ask it to determine that the approval of the right-of-way is contrary to public interest. He argues that, if it is not in the public interest to permit the withdrawal of more water by farmers, it is not in the public interest to permit the withdrawal of water by Kaiser, especially since some water used in irrigation will return to the basin while that taken out of the valley by Kaiser will not. He reiterates his contention that Kaiser's mill site claims are not valid, and he attempts to distinguish the cases of *Sierra Grande Mining Co. v. Crawford*, *supra*, and *Ash Peak Mining Company*, *supra*, from the present case upon the premise that in the first case the water was "absolutely necessary" to the operation of the mine, and in the second it was "essential," while, in this instance, Kaiser has water available from other sources, and there is nothing to show that this particular water is essential to the operation of Kaiser's mine. Moreover, the appellant asserts, in both the *Sierra Grande* and *Ash Fork* cases there was use and occupancy in the sense of employees living on the site, while, in this case, Kaiser's operation is automated.

The Department has long held that questions involving the control and appropriation of the waters of a State cannot be adjudicated under an application for right-of-way privileges over the public land. *Surface Creek Ditch and Reservoir Co.*, 22 L.D. 709 (1896). Despite his assertions to the contrary, this is precisely what the appellant is asking the Department to do, for, aside from the question of the right to appropriate water, he has not suggested in what way the approval of Kaiser's right-of-way application might be contrary to the public interest.

The Department, of course, will not approve an application for a water pipeline right-of-way if it is determined that the applicant has no right to the water which he proposes to convey. See *Otis A. Roberts*, 69 I.D. 91 (1962). Thus, a determination that Kaiser's use of mill sites for the purpose of supplying water pumped from the ground for use in a mining operation is unauthorized would necessarily result in a finding that Kaiser had no lawful water supply and in the rejection of its right-of-way application. However, we concur in the Bureau's finding that such use of a mill site is consistent with the provisions of Rev. Stat. § 2337 (1875), as amended, 30 U.S.C. § 42 (1964). This is not to be construed as a determination that Kaiser's mill sites



are, in fact, valid. If Kaiser has failed to comply with the requirements for a mill site claim, the facts of such noncompliance may be called to the attention of the Department and may provide the basis for the initiation of adverse proceedings, but the appellant has not alleged the existence of such facts. He has asked simply that we find that the use of a mill site for the purposes indicated here is inherently unlawful.

The appellant's attempt to distinguish this case from the *Sierra Grande* and *Ash Peak* cases, *supra*, is not based upon valid distinctions. The Department did find in the *Sierra Grande* case that the water supply in question was "absolutely necessary" to the operation of the mine and, in the *Ash Peak* case, *supra*, "that the water developed from said wells is used in operating the mine, and water essential therefor is obtainable from no other source except at a cost which is prohibitive." It is also true that in both of those cases the mill sites were used to house employees of the mining companies. However, while the use of the land for living quarters for employees was an important factor, since that alone might have validated the use of the mill sites (see *Satisfaction Extension Mill Site*, 14 L.D. 173 (1892)), the decisions cannot reasonably be construed as holding such use to be an indispensable requirement. In fact, they cannot be so construed since, in the *Ash Peak* case, *supra*, two mill sites were involved and were found to be valid, but housing for employees was erected on only one of the mill sites. Moreover, while the decisions indicate that the need for water taken from the mill site for mining purposes must be shown, they did not indicate that a claimant must prove that a particular mill site is the only available source of water.

In the *Ash Peak* case, *supra*, the requirements for a mill site claim of this nature and the distinction between qualifying use and non-qualifying use were clearly set forth when the Department stated that:

The Commissioner's decision appears to the Department to draw too narrowly the lines within which a mill-site claim must be found to be used for mining purposes to meet the terms and spirit of said statute. It was held in the \* \* \* [case of *Charles Lennig*, 5 L.D. 190 (1886)], that the mill site could not be patented because the claim of its use in connection with the mine was merely the use of a water right within its limits for the supplying of water to the mill-site claimant's neighboring mine—not the use of the land itself as distinguished from the use of the water right situated thereon. This rule was followed in *Cyprus Mill Site* (6 L.D. 706), and in *Two Sisters Lode and Mill Site* (7 L.D. 557), as well as in *Iron King Mine and Mill Site* (9 L.D. 201), where the use shown was in taking of water from a creek flowing through the mill site, with the aid of improvements built thereon, and the conveying of it thence by pipe to a smelter reservoir elsewhere, which smelter was presumably used for the reduction of the product of the applicant's lode claim embraced in the same application.

But these cases and particularly the *Lennig* case, *supra*, are distinguished in the later case of *Sierra Grande Mining Co. v. Crawford* (11 L.D. 338), and *Gold Springs and Denver City Mill Site* (13 L.D. 175), upon the ground that in the

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later cases the water obtained on the mill site, which was essential to the operation of the applicant's mine, was obtained by means of improvements erected on the land, which was also indispensable as a site for contemplated reduction works. \* \* \*

The *Sierra Grande* case, *supra*, is decisive of the one at bar. The distinction is clear. In the *Lennig* case, *supra*, acquisition of the land claimed as the mill site was not essential to the utilization of the water right acquired within its limits and no other use of the land in connection with mining, or substantial improvement thereof, was shown, and in the *Iron King Mine and Mill Site*, *supra*, the taking of water from the mill-site claim and its conveyance from thence to a smelter apparently not in the applicant's mining claim were held to be too remote to rank as its use in connection with the mining operations, while in the case at bar, the water is obtained by the sinking of wells on the mill-site areas, in itself a substantial and permanent improvement thereof (not to mention the other improvements on said mill sites), and it is conveyed thence to the mining claims for use directly in their operation, to which it is essential. (*Italics added.*) 47 L.D. at 581.

Appellant does not contend that the water in this case is not necessary for Kaiser's mining operation or that Kaiser has not constructed substantial and permanent improvements upon the land for the purpose of extracting water from the ground.<sup>1</sup> Thus, it would appear that Kaiser has satisfied the requisites prescribed above, *i.e.*, actual use of the land itself for a purpose directly connected with the operation of the mine to which the mill site is an appendage, and, insofar as approval of the right-of-way application may be dependent upon the validity of the mill site claims, no disqualification has yet been shown by the appellant.

We turn then to the question of public interest. The Department has, as the appellant asserts, refused to classify land as suitable for desert land entry where it has found that a favorable classification would, contrary to the public interest, increase the pressure on an already inadequate supply of water available for use in a particular area. Such action, however, has been taken in situations which are not analogous to the one before us. To understand the problem, it is necessary to consider the water law of California as it relates to percolating water.

The Department's understanding of the law is set forth in *Ruby E. Huffman et al.*, 64 I.D. 57 (1957). This law, as it pertains to privately owned lands, is that the owners of land overlying a source of percolating water have correlative rights to use such proportionate share of the percolating water as they can put to a reasonable beneficial use on their overlying land. Such right is superior to that of one who seeks to take, *i.e.*, appropriate, the water for a non-overlying use, such as exportation beyond the underground water basin. Such a person can

<sup>1</sup> The appellant does, as we have noted, assert that Kaiser could obtain the needed water from other sources. Apart from the fact that we find no basis for requiring Kaiser to prove that it cannot obtain the water from any other source, the appellant's assertion is strongly contested by Kaiser, and the assertion is based upon some rather oblique reasoning, unsupported by persuasive evidence.

only appropriate water which is surplus to the needs of the overlying landowners and, in the event of a shortage, his rights must yield to the needs of the overlying landowners. If a person takes non-surplus water for a non-overlying use, he may be enjoined by the overlying owner from taking the non-surplus water. If he is not timely enjoined, however, he may acquire a prescriptive right to the use of the non-surplus water as against the overlying landowners.

In the case before us appellant, an overlying landowner, claims that Kaiser is taking underground water in the Chuckawalla basin to the detriment of the overlying landowners, who need the water for beneficial use, and is transporting the water out of the basin for use on land outside of the basin. If this is so, if Kaiser is attempting to appropriate non-surplus water, the appellant and other overlying landowners would appear to have a clear remedy, namely, to enjoin Kaiser from taking such water as is needed by the overlying landowners. If Kaiser is taking only surplus water, then appellant has no cause for complaint.

In effect, then, appellant is seeking to have the Department do indirectly—by denial of the right-of-way application—what appellant can do directly in the State courts. This points up rather sharply that the basic issue is one of water rights, which the Department refuses to adjudicate.

It also serves to distinguish the situation here from those in which the Department has refused to open up additional land in the Chuckawalla Valley to further agricultural entry for the reason that the additional drain on the water supply would adversely affect existing agricultural enterprises. If such entries were allowed and patented, the patentees, as overlying landowners, would have the same correlative rights as the appellant and other present landowners. Because both new and old landowners would have a right to their proportionate share of the underground water, appellant and the present landowners who might suffer a reduction in their share would have no recourse against the new landowners who caused the reduction. They could not protect their needs as they can against Kaiser.

For that reason, the Department's actions in the situation referred to by the appellant do not involve the same considerations as those involved in the present case.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A (4) (a) ; 24 F.R. 1348), the decision appealed from is affirmed.

ERNEST F. HOM,  
*Assistant Solicitor.*

## GRANT LIMITATIONS

May 31, 1966

FEDERAL WATER POLLUTION CONTROL ACT  
SECTION 8(b)—GRANT LIMITATIONS

Act of June 30, 1948—Act of July 9, 1956—Act of October 2, 1965

Water Quality Act, October 2, 1965, 79 Stat. 903, which amends the Federal Water Pollution Control Act, July 9, 1956, 70 Stat. 498, 33 U.S.C. sec. 466 *et seq.*, authorizes grants in support of sewage treatment facility construction from the allocation of funds in excess of the first \$100,000,000 appropriated for such purpose without limitation that grants not exceed \$1,200,000 per project of \$4,800,000 in the case of multi-municipal projects.

Act of June 30, 1948—Act of July 9, 1956—Appropriations

Grants in support of a sewage treatment facility construction project under section 8 of the Federal Water Pollution Control Act, June 30, 1948, 62 Stat. 1155, as amended, 33 U.S.C. sec. 466 *et seq.*, may be awarded from a combination of funds allocated both from the first \$100,000,000 appropriated for such purpose, and from funds allocated from appropriations in excess of the first \$100,000,000 appropriated.

Act of June 30, 1948—Act of July 9, 1956—Appropriations

Where a sewage treatment facility construction project is supported with the maximum grant award of \$1,200,000 or \$4,800,000 from funds allocated from the first \$100,000,000 appropriated under section 8 of the Federal Water Pollution Control Act, as amended, grant award for such project may also be made from funds allocated from appropriations in excess of the first \$100,000,000, up to a maximum of 30 percent of the cost of a project.

M-36688

May 31, 1966

To: Commissioner of Federal Water Pollution Control Administration

Subject: Federal Water Pollution Control Act—Section 8(b)—  
Grant Limitations

This is in response to the memorandum of May 16, 1966, from Mr. Paul W. Reed, Chief, Construction Grants Program in which he inquires whether a grant may be made under section 8 of the Federal Water Pollution Control Act, as amended (33 U.S.C. 466 *et seq.*) from a combination of funds allocated under the second sentence of subsection (c) of section 8 of the Act ("the first \$100,000,000 appropriated") and from funds allocated under the third sentence of subsection (c) of section 8 ("sums in excess of \$100,000,000 appropriated").

As we understand the situation from your memorandum, in a case where a sewage treatment facility construction project is eligible for the maximum grant of \$1,200,000 for a facility to serve one municipality, or \$4,800,000 for a facility to serve more than one municipality, and where such maximum grant will be paid from funds allocated under the second sentence of subsection (c) of section 8 (the first \$100,000,000) the program wishes to make available from the allocation under the third sentence of subsection (c) of section 8 (ap-

propriation in excess of the first \$100,000,000) additional grant funds to support the construction of the same project.

In our opinion there is no legal objection to such an award of grant funds provided that: (a) the total Federal grant award from both allocations does not exceed 30 percent of the cost of construction of the project as determined by the Secretary, (b) the State agrees to match equally all Federal grants made from the allocation under the third sentence of subsection (c) of section 8 for projects in the State, and (c) the project is otherwise eligible for Federal support.

The last sentence of subsection (b) of section 8 of the Act provides:

The limitations of \$1,200,000 and \$4,800,000 imposed by clause (2) of this subsection shall not apply in the case of grants made under this section from funds allocated under the third sentence of subsection (c) of this section if the State agrees to match equally all Federal grants made from such allocation for projects in such State.

That provision was added by the Water Quality Act of 1965, 79 Stat. 903 for the purpose of authorizing grants in excess of \$1,200,000 and \$4,800,000 up to a maximum of 30 percent of the cost of the construction of a project. The allocation of funds in excess of the first \$100,000,000 appropriated for facility construction grants is apparently intended to provide grant funds beyond the \$1,200,000 or \$4,800,000 available under the other allocation (the first \$100,000,000) up to a maximum of 30 percent of the cost of the project.

The provision of the Water Quality Act of 1965, quoted above, is described in the Report of the House Committee on Public Works as follows:<sup>1</sup>

Annual appropriations for fiscal years 1966 and 1967, the two remaining years authorized, are authorized to be increased from \$100 to \$150 million, of which \$100 million is to be allotted to the States under the existing formula and all amounts appropriated in excess of \$100 million are to be allotted on the basis of population. *Project grants above the new dollar ceiling limitations up to a full 30 per cent are authorized from the latter allotment if the State matches the full Federal contribution made to all projects from this allotment. (Italics added)*

There is no requirement that a grant made from funds allocated from appropriations in excess of the first \$100,000,000 constitute the entire Federal award in support of an eligible project. On the contrary, it appears to us that grants made from that allocation are intended to provide funds in addition to the \$1,200,000 or \$4,800,000 available for a project from the other allocation, so as to provide Federal support of up to 30 percent of the cost of construction of an eligible project.

If you have further questions we will be pleased to discuss them with you.

EDWARD WEINBERG,  
Deputy Solicitor.

<sup>1</sup> H.R. Rep. No. 215, 89th Cong. 1st Sess. 3 (1965).

June 13, 1966

**WATER QUALITY STANDARDS—INTERSTATE WATERS WITHIN  
THE MEANING OF SECTION 10(c) FEDERAL WATER POLLUTION  
CONTROL ACT, AS AMENDED**

**Act of June 30, 1948—Act of July 9, 1956—Act of July 20, 1961—Act of  
October 2, 1965**

"Interstate waters" within the meaning of the Federal Water Pollution Control Act, as amended, 33 U.S.C. 466, *et seq.*, include the entire reach of interstate waters, including those portions which flow into a state from a neighboring state but which do not subsequently flow across or form state boundaries.

**Act of June 30, 1948—Act of July 9, 1956—Act of July 20, 1961—Act of  
October 2, 1965**

"Coastal waters" within the meaning of the Federal Water Pollution Control Act, as amended, 33 U.S.C. 466, *et seq.*, include waters of the sea within the territorial jurisdiction of the United States and all inland waters in which the tide ebbs and flows.

**Act of June 30, 1948—Act of July 9, 1956—Act of July 20, 1961—Act of  
October 2, 1965**

Tributaries of interstate waters are not *per se* interstate waters. Only those tributary streams which themselves either flow across or form a part of state boundaries are interstate waters.

M-36690

June 13, 1966

**TO: COMMISSIONER, FEDERAL WATER POLLUTION CONTROL ADMIN-  
ISTRATION.**

**SUBJECT: WATER QUALITY STANDARDS—INTERSTATE WATERS WITHIN  
THE MEANING OF SECTION 10(c) FEDERAL WATER POLLUTION CON-  
TROL ACT, AS AMENDED.**

Your memorandum of May 25, 1966, requested our opinion on questions raised in the May 16, 1966, letter of Mr. Arthur N. Beck, Technical Secretary of the Water Improvement Commission of Alabama.

Mr. Beck inquires whether waters which flow into a state from an adjoining state, but which do not subsequently flow across or form state boundaries, are, for those portions of such water in the last receiving state, included within the meaning of "interstate waters" for which water quality criteria are to be established under section 10(c) of the Federal Water Pollution Control Act, as amended, 33 U.S.C. 466, *et seq.* Mr. Beck refers to the Coosa, Tallapoosa and

73 I.D. Nos. 6 & 7

Tombigbee Rivers as streams which flow into Alabama from neighboring states, and which terminate in Alabama without subsequently crossing or forming state boundaries. He inquired whether water quality criteria are to be established for portions of those streams which lie in Alabama.

Confirming our oral advice of June 2, in our opinion water quality criteria are to be established under the Act for the entire reach of interstate waters, including those portions which flow into a state from a neighboring state but which do not subsequently flow across or form state boundaries.

Section 10(c)(1) of the Act provides for state adoption of "water quality criteria applicable to interstate waters or portions thereof within such state." Section 13(e) defines "interstate waters" to mean "all rivers, lakes, and other waters that flow across or form a part of state boundaries, including coastal waters."

That definition, as pointed out in the Federal Water Pollution Control Administration Guidelines for Establishing Water Quality Standards for Interstate Waters of May 1966, page 11, is in terms of water bodies—"rivers," "lakes" and "other waters." If a river at some point crosses or forms a part of a state boundary, that river takes on the character of "interstate waters" for its entire reach.

There is no indication in the legislative history of the Water Quality Act of 1965 (P.L. 89-234), which amended the Federal Water Pollution Control Act to authorize the establishment of water quality standards, that portions of an interstate river in the last receiving state were to be excluded from the scope of "interstate waters" for purposes of establishing water quality standards. On the contrary, it is apparent from the legislative hearings that the standards were considered in terms of entire rivers or river basins.<sup>1</sup>

It is important to note that the House Committee in its report on S. 4, which, as modified became the Water Quality Act of 1965, made the following comment regarding "interstate waters:"<sup>2</sup>

Under the definition of "interstate waters" in the Act those waters that rise entirely within a state and do not flow from that state into another state, and do not form a part of the state boundaries, are not considered to be interstate waters and therefore would not be subject to any requirements with respect to water quality criteria.

The Committee has provided, in effect, a definition of "*intrastate waters*" which are waters not subject to the water quality requirements

<sup>1</sup> See for example, Hearings on H.R. 3988, S. 4 and Related Bills, before the House Committee on Public Works, 89th Cong., 1st Sess. 44, 59 (1965).

<sup>2</sup> H.R. No. 215, 89th Cong. 1st Sess. 9 (1965).

June 13, 1966

of the Act and which are to be distinguished from "interstate waters." The Committee having addressed itself to the question, clearly did *not* include portions of interstate rivers lying in the last receiving state within its concept of "intrastate waters."

Mr. Beck also inquires whether Mobile Bay is or is not a coastal water. The term "coastal waters" is not defined in the Act. The legislative history of the Federal Water Pollution Control Act amendments of 1961 (P.L. 87-88) which added "coastal waters" to the definition of "interstate waters" provides no information as to the scope to be given to the term "coastal waters." It is defined in the dictionary as follows:<sup>3</sup>

coastal waters, that is the waters of bays and inlets, as well as of the sea, along a coast.

"Coastal navigable waters of the United States" is defined in the Oil Pollution Act of 1924 (33 U.S.C. 431 *et. seq.*) as follows:

Sec. 432 *Definitions*

\* \* \* \* \*

(c) the term "coastal navigable waters of the United States" means all portions of the sea within the territorial jurisdiction of the United States, and all inland waters navigable in fact in which the tide ebbs and flows.

The dictionary definition and that in the Oil Pollution Control Act of 1924 are consistent in that under both definitions "coastal waters" includes a portion of the sea and a portion of inland waters, as those terms are generally understood.<sup>4</sup> Those definitions would include the waters immediately adjacent to the coast line,<sup>5</sup> i.e., the marginal sea seaward of the coastline (3 miles) and the inland waters landward as far as they are subject to the ebb and flow of the tide.

In our opinion "coastal waters" within the meaning of the Federal Water Pollution Control Act include waters of the sea within the territorial jurisdiction of the United States and all inland waters in which the tide ebbs and flows. As used in this Act, such waters need not be navigable.

<sup>3</sup> Webster's New International Dictionary, 2d Edition, Unabridged (1951).

<sup>4</sup> Shalowitz, *Shore and Sea Boundaries*, Vol. 1, pp. 22, 23 (1962). Navigable water is generally divided into three categories: (1) *Inland Waters* including rivers, lakes and other bodies of water within a land territory and bays; (2) *Marginal Sea*, the waters seaward of the low water mark of a coast to the limit of the adjacent territories' jurisdiction (3 miles) and (3) *The High Seas*, the waters seaward of the marginal sea.

<sup>5</sup> Technically, the coastline is referred to as the "baseline" which is described as "following the sinuosities of the low water mark, except where indentations are encountered that fall within the category of 'true' bays, when the baseline becomes a straight line between the headlands." Shalowitz, *Shore and Sea Boundaries*, Vol. 1, pp. 27, 28 (1962).



If Mobile Bay is either a part of the sea within the territorial jurisdiction of the United States, or is inland water subject to the ebb and flow of the tide, it is a part of coastal waters.

In view of Mr. Beck's comments regarding the tributaries of Alabama rivers it should be emphasized that, under the Act, tributaries of interstate waters are not *per se* interstate waters for which water quality standards are to be established. Only those tributary streams which themselves either flow across or form a part of state boundaries are interstate waters. But, as pointed out in the Guidelines (p. 11) the discharge of matter into tributaries not themselves interstate waters which reaches interstate waters and reduces the quality of the latter below the standards for interstate waters is subject to abatement under the Act.

In summary: (1) Water quality standards are to be established for the full reach of interstate rivers including those portions within the last receiving state; (2) "Coastal waters" means the sea within the territorial jurisdiction of the United States and inland waters subject to the ebb and flow of the tide; (3) Tributaries of interstate waters are not, by that fact alone, rendered interstate waters.

EDWARD WEINBERG,  
*Acting Solicitor.*

UNITED STATES  
v.  
HENAUT MINING COMPANY

A-30540

*Decided June 15, 1968*

**Mining Claims: Discovery**

To constitute a valid discovery upon a lode mining claim there must be a discovery on the claim of a lode or vein bearing mineral which would warrant a prudent man in the expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine; it is not sufficient that there is only a meagre surface showing in veins or lodes which, considered with knowledge of the geology of the area and of the successful mining operations conducted on adjoining claims, would warrant further exploration in the hope of finding a valuable deposit in a separate vein or lode at depth.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Henault Mining Company has appealed to the Secretary of the Interior from a decision dated August 12, 1965, whereby the Office of

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Appeals and Hearings, Bureau of Land Management, reversed in part a decision of a hearing examiner declaring the Automobile lode mining claim in T. 4 N., R. 3 E., B.H. Mer., South Dakota, subject to the limitations and restrictions of section 4 of the act of July 23, 1955, 69 Stat. 368, 30 U.S.C. § 612 (1964), and dismissing, as to eighteen other lode claims in Ts. 4 and 5 N., R. 3 E., a proceeding initiated pursuant to section 5 of the act of July 23, 1955, 69 Stat. 369, as amended, 30 U.S.C. § 613 (1964).

On October 3, 1960, and February 18, 1961, the appellant filed verified statements claiming rights contrary to or in conflict with the limitations and restrictions of section 4 of the act of July 23, 1955, *supra*, as to the Red Beard, McLaughlin, Keno, Gold Mine, Gold Mine No. 1, Gold Mine Fraction, Blanche B., W. S. Stratton Nos. 4 and 5, Ice Pond, Joseph, Bonaparte, Pearl, Carline, Rescue Bond Nos. 2 and 3, Strawberry Nos. 1 and 2, Automobile, Globe Fraction and Oscar lode mining claims. The Government recognized the rights asserted by the appellant as to the Globe Fraction and Oscar lode claims, and, by a decision dated February 23, 1962, the Montana land office accepted the verified statement of the appellant as to those claims. However, the Government requested a hearing to determine the rights of the claimant as to the other nineteen claims, and a hearing was held for that purpose at Rapid City, South Dakota, on October 22, 23 and 24, 1963.

The basic facts concerning the location, ownership, workings and surface mineralization of the claims are not in dispute. The claims were all located prior to July 23, 1955, and are presently owned by the appellant. At the hearing, both the Government and the mining claimant presented in evidence assays of numerous samples of minerals which were taken from the claims by Ernest T. Tuckek, a geologist employed by the Bureau of Land Management, and by Ernest Shepherd, a geologist working under the supervision of Lawrence B. Wright, a consulting geologist retained by the mining claimant. The samples were taken from various pits, cuts and adits on the claims during extensive examinations by the two geologists and were assayed for gold and silver values.

The Government's case was based solely upon the results of the surface examination and upon the lack of evidence disclosed by such examination of the existence of a vein or lode from which one might reasonably hope to develop a profitable mine. The appellant's case, on the other hand, was based primarily upon the testimony of Wright,

who examined the appellant's claims in 1948 and in 1961 and made specific recommendations for further mineral exploration on the claims and whose deposition, taken at San Francisco, California, on October 3 and 4, 1963, was admitted in evidence over the vigorous protest of counsel for the Government.

The hearing examiner found from the testimony that the two geologists (Tuchek and Shepherd) met occasionally during their examinations but that their work was entirely separate, that they did not necessarily sample in precisely the same places but that a comparison of the values found in their samples revealed, within the limits of human tolerance, similar results. He noted that, although the gold and silver content of the samples taken varied from trace amounts to a high of \$15.87 per ton in one sample, the values found in the great majority of the samples ranged from 9 cents to less than \$1 per ton. The examiner found this evidence to be conclusive that there are exposed within the limits of each claim, except the Automobile lode, veins or lodes of rock in place containing some amounts of gold and silver, and he found the evidence to be conclusive that there is no surface exposure of minerals on any of the claims which can be mined at a profit.

The examiner further found that all of the experts in the field of geology who appeared at the hearing testified that the land upon which the claims are situated is mineral in character, that the claims are surrounded by patented mining claims and that they lie immediately adjacent to the present working area from which the Homestake Mining Company, the largest gold producer in the United States, is extracting ore at a profit. He found that appellant's witness Wright has an intimate knowledge of the geology of the area, that he was employed by the Homestake Mining Company from 1919 to 1931, for the last six years of that period as chief geologist for the company, that he is thoroughly familiar with all of the mining and geologic technical publications on the Black Hills region and that he conducted and supervised the examination of the Henault claims which culminated in the 1948 and 1961 reports. He then summarized Wright's conclusions as follows:

1. That the Henault Mining Company's claim group lies within the province of major gold mineralization in the Black Hills.
2. That the claims lie adjacent to the country's greatest producer of gold which is of no significance except that the geologic structural relations are such that the proximity has real value.
3. That the geology of the Henault ground is structurally related to that of the Homestake Mining Company's ground and ore deposits in such a manner that

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the possibility of deep ore deposits such as are being developed by Homestake may reasonably be expected at minable depths at Henault.

4. The values in gold and silver existing in Henault ground can only lead to the conclusion that these surface expressions are "upward leaks" effected at the time of mineralization from substantial deposits below.

5. That the tertiary dike zone through the center of the Henault claims emplaced in an anticlinal structure (believed to elevate the favorable Homestake formation closer to the surface) is additional incentive to moderately deep exploration for substantial amounts of ore.

6. That all Henault holdings are of mineral character and, considering that almost all surrounding grounds have been patented, are entitled to the same consideration for patent.

The examiner then noted that Wright recommended that at least three holes be drilled to a depth of 3,500 to 4,000 feet to probe for minerals at depth.<sup>1</sup> The soundness of Wright's recommendations was attested to by Professor Edwin H. Oshier, a mining engineer and head of the Department of Mining Engineering at the South Dakota School of Mines and Technology, who had not personally examined the claims but whose opinion was based upon a review of Wright's reports and upon Wright's reputation as an authority on the geology of the northern Black Hills.

The examiner found that, although the qualifications of the Government's expert witnesses could not be questioned, neither of the two witnesses who testified in behalf of the Government had as thorough a knowledge of the geology of the area as did Wright and that, from a geologic standpoint, their examinations did not approach those of Wright in thoroughness. He, therefore, accepted the recommendations of Wright as to the possibilities for following the veins or lodes on the surface of the Henault claims as being the best available information upon which a prudent man would rely. After noting the requirements for a discovery of valuable minerals, as set forth in *Castle v. Womble*, 19 L.D. 455 (1894),<sup>2</sup> and *Chrisman v. Miller*, 197 U.S. 313

<sup>1</sup> The hearing examiner stated in his decision that "[a]t an estimated cost of \$14.50 per foot the cost of such drilling would entail expenditures of \$360,000 to \$480,000." Wright did state that the cost of diamond drilling would be approximately \$14.50 per foot (Deposition of Lawrence B. Wright, p. 61.), but the source of the "\$360,000 to \$480,000" figures is not clear, although those figures have been cited by the appellant in its present appeal. The correct amount here is not essential to the outcome of the case, however, and it is unnecessary to resolve the apparent mathematical discrepancy.

<sup>2</sup> "[W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met." 19 L.D. at 457.

(1905), and for a lode claim in particular, as set forth in *Jefferson-Montana Copper Mines Co.*, 41 L.D. 320 (1912),<sup>3</sup> the examiner stated that, while it is true that the courts and the Department of the Interior have never accepted geological inference standing alone, however strong, as a substitute for an actual exposure of valuable mineral sufficient to constitute a discovery, such evidence is of prime importance in determining whether or not values exposed in veins or lodes, if followed, could reasonably be expected to lead to greater values at depth. He then cited language from the *Jefferson-Montana Copper Mines Co.* decision, *supra*, to the effect that :

It is clear that many factors may enter into the third element: The size of the vein, as far as disclosed, the quality and quantity of mineral it carries, its proximity to working mines and location in an established mining district, the geological conditions, the fact that similar veins in the particular locality have been explored with success, and other like facts, would all be considered by a prudent man in determining whether the vein or lode he has discovered warrants a further expenditure or not. 41 L.D. at 323-324.

The hearing examiner then found that it had been established that on each of the claims, except the Automobile, there are veins of rock in place containing valuable minerals and that, although most of the assays revealed nominal or very low values which could not in any sense be considered worthwhile to mine, the mineralization was there, and, in view of the favorable geology of the area, he concluded that there had been a discovery on each of those claims. He acknowledged that his conclusion rested squarely on the acceptance of Wright's recommendations. With respect to the Automobile claim, he found that neither party had found or sampled any structures on the claim, that there were no pits or evidence of prospecting on the claim, and that the *prima facie* showing of lack of discovery had not been rebutted. That claim, accordingly, was declared subject to the restrictions and limitations of section 4 of the act, *supra*.

The United States, acting through the Montana State Director, Bureau of Land Management, appealed to the Director, Bureau of Land Management, from the hearing examiner's decision as to the eighteen claims on which the examiner found that there had been a discovery, and, by its decision of August 12, 1965, the Office of Appeals and

<sup>3</sup> "1. There must be a vein or lode of quartz or other rock in place;

2. The quartz or other rock in place must carry gold or some other valuable mineral deposit;

3. The two preceding elements, when taken together, must be such as to warrant a prudent man in the expenditure of his time and money in the effort to develop a valuable mine."

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Hearings reversed the hearing examiner's decision as to those claims upon a finding that the evidence and testimony of the mining claimant's experienced witness did not establish as an existing fact that the Homestake formation underlies the Henault claims and that the evidence, at most, indicates that the claims warrant further exploration to determine whether the Homestake formation is under the claims and whether it is sufficiently mineralized.

In reaching its conclusions, the Office of Appeals and Hearings held that the mining claimant has the burden of establishing by a preponderance of the evidence that there is a discovery within the limits of each claim (*Foster v. Seaton*, 271 F. 2d 836 (D.C. Cir. 1959)), that the mere hope or expectation, based upon a general belief, that values will increase at depth is not sufficient to establish a valid discovery (*United States v. Duvall and Russell*, 65 I.D. 458 (1958)), that there is a difference between the evidence which will induce a person of ordinary prudence to spend his time and money in an effort to develop a valuable mine and the evidence which will induce him to spend his time and money for further exploration, and that the reports and testimony upon which the mining claimant and the hearing examiner relied were clearly of the latter category. It concluded that the evidence presented in the hearing did no more than to raise a geological inference that there are valuable mineral deposits to be found on the claims, that this inference may engender willingness on the part of a mining claimant to take the risk involved in further exploration, but that these factors, no matter how strong, do not constitute, and cannot be substituted for, a discovery, citing *United States v. Edgecumbe Exploration Company, Inc.*, A-29908 (May 25, 1964), and *United States v. C. F. Snyder et al.*, 72 I.D. 223 (1965).

The Office of Appeals and Hearings also held that the hearing examiner's decision had become final as to the Automobile claim, since the mining claimant did not appeal from the ruling, and it denied the claimant's request for oral argument.

In its present appeal the appellant contends, in substance that:

(1) The mining claimant's evidence fully satisfies the requirements of a discovery as set forth in *Castle v. Womble*, *supra*, and in *Jefferson-Montana Copper Mines Co.*, *supra*;

(2) The Bureau applied a different test from the accepted standard, requiring the claimant to show that a prudent man would be warranted in the expenditure of his time and money "in developing a valuable mine," whereas the proper showing would be that such a man would be

warranted in the expenditure of time and money "in the effort to develop a valuable mine"; and

(3) The hearing examiner and the Office of Appeals and Hearings erred in finding immaterial appellant's proposed findings that the land upon which the claims are located contains no timber of commercial value, is not usable for grazing or recreational purposes, and is not contemplated to be used for building sites, that the claims were located and are held in good faith for the purpose of acquiring the land because of its mineral deposits, and that the mining claimant is convinced that further expenditure of time and effort can reasonably be expected to develop a valuable mine on the claims and has substantiated this belief by the expenditure of at least \$57,000 in assessment work on the claims since 1945. The appellant has also renewed its request for oral argument.

There is essentially no dispute as to the facts of this case. It has not at any time been suggested that a workable mineral deposit has been uncovered on any of the claims in question or that any exposed area on the claims is a part of a vein or lode which, in itself, appears to contain values which would warrant efforts to develop a valuable mine. On the other hand, no effort was made by the Government to challenge the validity of the findings or the recommendations of appellant's witness Wright. Only the legal effect of his findings is challenged, and the sole issue in this appeal is whether those findings, considered alone or with the established facts of the case, are sufficient to constitute a discovery under the mining laws.

Stated briefly, it is our view that the decision of the Office of Appeals and Hearings is consistent with the Department's interpretation of the law of discovery and that the views advocated by the appellant, and accepted by the hearing examiner, are not.

The basic problem in this case is that the appellant has failed to distinguish between "exploration" and "development" and that it has ignored the long-recognized requirement that the vein or lode upon which a discovery is based must be exposed within the limits of each claim.

As the Bureau has pointed out, the Department recognizes a distinct difference between "exploration" and "development" as they relate to "discovery" under the mining laws. Exploration work is that which is done prior to discovery in an effort to determine whether the land contains valuable minerals. Where minerals are found, it is often necessary to do further exploratory work to determine whether those minerals have value and, where the minerals are of low value, there

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must be more exploration work to determine whether those low-value minerals exist in such quantities that there is a reasonable prospect of success in developing a paying mine. It is only when the exploratory work shows this that it can be said that a prudent man would be justified in going ahead with his development work and that a discovery has been made. *United States v. Clyde R. Altman and Charles M. Russell*, 68 I.D. 235 (1961); *United States v. Edgcombe Exploration Company, Inc.*, *supra*; *United States v. Ford M. Converse*, 72 I.D. 141 (1965).<sup>4</sup>

This is not an artificial or arbitrary distinction fabricated by the Department. It is simply a recognition that these separate stages of mining activity do exist and that there is a significant difference in their meaning insofar as they may influence further mining effort. Moreover, the distinction between these terms was clearly recognized by the appellant's witness Wright, as illustrated by the following excerpt from his testimony:

Q. [by Mr. Carrell, counsel for claimant]. Would you please state what your understanding of those terms [development, exploration and mining] and their interrelationship is in connection with this field and this particular proceeding.

A. Well, taking them in a little different order than you just recited them, it is a customary practice in the mining business, particularly where new ventures are concerned, to first make an examination, and, if the results of the examination justify, then some exploration steps are usually recommended of one kind or another. They might, the exploration might consist of sinking an exploratory vertical shaft or, if it is a very mountainous country, driving an adit into the mountain, or it might consist of doing nothing more than, in the beginning, than diamond drilling to test possibilities with depth. This is exploration.

Now then, if the results of the exploration justify a further larger expenditure, then you begin to develop the property by expanding your underground work or, if it is an open pit mine, by starting an open pit, for example. Then as your development reaches an adequate stage, your exploitation or mining or production of the material being sought is the last stage.

Q. In connection with the examination of the properties did you recommend that any diamond drilling be done on the Henault Group?

A. I did. I felt that the entire situation, the geologic environment and the surface showings justified a step of exploration and along those lines I recommended a limited diamond drilling program and I outlined approximately where I thought the drilling should take place on the properties. Wright deposition, pp. 47-48.

The appellant suggests that the Bureau has required the actual development of a valuable mine with proved ability to produce at a profit.

<sup>4</sup> The *Converse* decision has been challenged in *Converse v. Udall*, Civil Action No. 65-581 in the United States District Court for the District of Oregon.



This is not so. It is only after the fourth stage listed, "exploitation," has been entered that it can be determined with any degree of finality whether or not a mine will be economically successful. The Department has not required that this, or even the third stage, the development, be initiated in order to establish a discovery. The substance of the cited decisions is that the second stage of a mining venture, the exploration, must have satisfactorily progressed to the point at which the further expenditure of money and effort for the third phase may be favorably contemplated. The appellant, however, has accomplished only the first of the four steps enumerated by Wright and appears now to be on the threshold of entering the second phase, and the recommendations go only to the taking of the second step, the witness having expressly refrained from making recommendations beyond that step until the results of the recommended exploration could be ascertained. See Wright deposition, pp. 67-68. Had the appellant's expert witness recommended the sinking of a shaft and the driving of levels at any point in the claims, we would be faced with an entirely different question, but the witness did not make that recommendation, and, until the recommended exploratory steps are taken, there would appear to be no basis for determining whether a prudent man would be justified in expending money and effort with a reasonable expectation of developing a profitable mine.

In the *Converse* case, *supra*, we considered the apparent inconsistency of the Department's distinction between "exploration" and "development" and the court's determination in *Charlton v. Kelly*, 156 Fed. 433 (9th Cir. 1907), cited by the appellant here, that the terms mean the same thing, and we concluded that there was, in fact, no real inconsistency, for a different standard has long been employed when determining priority of right between conflicting mining claimants than is employed in determining whether lands should be taken from the jurisdiction of the United States. See 72 I.D. 149-150. The standard applied by the Bureau in the present case is the same as that which was applied in the *Converse* case and which we find to be proper in this instance.

Factually, appellant's claim of a discovery is based on the following: The mineral values in the area are found in the Homestake formation which has been extensively mined for gold by the Homestake Mining Company on adjoining property. The Homestake formation dips toward appellant's claims and outcrops at some distance beyond the claims. Because of this Wright testified that he believed that the formation extends beneath the Henault claims. The formation does

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not outcrop on the claims but a number of Tertiary dikes do. These dikes are believed to originate below the Homestake formation and to penetrate that formation on their way to the surface. The slight mineral values found in the dikes by the extensive sampling are believed to represent leaks from the minerals in the Homestake formation. However, the really valuable mineral deposits are expected to be found at the intersections of the dikes with the Homestake formation and it is to establish this that Wright recommended the drilling of three holes to depths of 3,500 to 4,000 feet. Wright deposition, pp. 50-59.

There is no contention that the Homestake formation has actually been exposed on any of the Henault claims. There is also no contention that the Tertiary dikes or intrusions carry valuable mineral deposits. They are claimed merely to establish that the Homestake formation, which is believed to carry the valuable deposits, lies below the surface, possibly a few thousand feet down.

In *East Tintic Consolidated Mining Claim*, 40 L.D. 271, 273 (1911), the Department stated that:

It is evident from the record before the Department that the deposits alleged to have been exposed on these claims are regarded by the applicant as possessing practically no economic value, but that, on the other hand, title to the claims is sought essentially on account of their possible value for certain unexposed deposits supposed to exist at considerable depth beneath the surface, and having no connection, so far as shown, with any deposits appearing on the surface. The exposure, however, of substantially worthless deposits on the surface of a claim; the finding of mere surface indications of mineral within its limits; the discovery of valuable mineral deposits outside the claim; or deductions from established geological facts relating to it; one or all of which matters may reasonably give rise to a hope or belief, however strong it may be, that a valuable mineral deposit exists within the claim, will neither suffice as a discovery thereon, nor be entitled to be accepted as the equivalent thereof. To constitute a valid discovery upon a claim for which patent is sought there must be actually and physically exposed within the limits thereof a vein or lode of mineral-bearing rock in place, possessing in and of itself a present or prospective value for mining purposes; \* \* \*.

In subsequent consideration of the same matter the Department stated:

\* \* \* Reading this petition in connection with the prior decision of the Department (40 L.D. 271) makes it evident that patent for these claims is being sought for the purpose of developing *supposed* deposits of ore—which we may call lodes—well below the surface of the ground, and that there is no claim that the deposits which it is intended to develop have been in fact discovered. The so-called discoveries on the surface of the various claims are

supposed to indicate that other unconnected veins or lodes lie at a greater depth. In other words, in these cases there is an apparent attempt to substitute observation, combined with geologic inference, for discovery. Whatever may be thought of its policy Congress has said in section 2320 of the Revised Statutes: "but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." Obviously, the words "*the* [italics in original] vein or lode" can only refer to the lode which it expected to develop and mine and cannot refer to disconnected bodies of ore of no possible value in themselves. Congress having laid down this rule for the guidance of the Department, the Department can do nothing but follow the will of Congress in this particular. If the rule is in general, as has been insisted, too narrow a one, or if it does not fit particular localities, obviously the remedy is to be sought at the hands of Congress; and it would be usurpation of authority in this Department to attempt to amend, directly or indirectly, the unmistakable language of the statute.

The question whether before patenting of a lode claim ore must be exposed of commercial value \* \* \* is manifestly not in point. *Any question as to the character of the vein or lode can only arise after the vein or lode on account of which patent is desired has been discovered. East Tintic Consolidated Mining Co. (on rehearing), 41 L.D. 255 (1912) ; italics added except as indicated.*

The principle enunciated here has been frequently repeated by the Department (see, e.g., *Rough Rider and Other Lode Claims*, 41 L.D. 242 (1911) ; *United States v. Edgcomb Exploration Company, Inc., Supra*; *United States v. C. F. Snyder et al., supra*), and, in spite of the appellant's efforts to distinguish this case from those cited, we find the evidence here to be essentially of the kind that the Department has consistently refused to accept as the equivalent of a discovery. It is, perhaps, true that the inferences arising from the circumstances of this case, *i.e.*, the location of the claims in an established mining district, surrounded by patented claims, the proximity to the nation's leading gold-producing mine, and the testimony of acknowledged authorities as to the geological formations of the area, are stronger than in most cases in which the Department has refused to accept these inferences. However, it is the nature of the evidence and not its strength which is the determining criterion.

The fact is that the assumed existence of the Homestake formation below the claims and the assumed existence of valuable gold or silver deposits in the formation assumed to exist are based on geologic inference. The fact too is that the existence of the formation in the claims and the existence of valuable minerals in the formation are not such a certainty that a prudent man would be justified in driving shafts with a view to the commencement of mining operations. All that Wright has recommended is further exploration by drilling test holes to determine if the Homestake formation underlies the claims and if it

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contains the mineral values he expects. The recommended drilling program is not inexpensive. There would be no point in undertaking it if the existence of the valuable Homestake formation in the claims were the certainty that appellant claims.

At this point we may note that appellant's reliance upon the language quoted earlier in the text from *Jefferson-Montana Copper Mines Co., supra*, is misplaced. This is the language to the effect that in determining whether the vein or lode he has discovered would warrant further expenditure, a prudent man would consider "[t]he size of the vein, as far as disclosed, the quality and quantity of mineral it carries, its proximity to working mines and location in an established mining district, the geological conditions, the fact that similar veins in the particular locality have been explored with success, and other like facts \* \* \*." This language clearly refers only to the vein or lode which has been discovered and "disclosed" and sets forth the factors for determining whether *that* vein or lode contains mineral values worth exploiting. In the case here, the only veins or lodes which have been exposed on the claims are the Tertiary dikes or intrusions which are not claimed to be source of valuable mineralization. The discovery upon which the appellant relies is of the Homestake formation which has not been exposed on the claims.

We think that the evidence clearly establishes that a discovery, as that term is understood and used by the Department, and as it is used by those in the mining profession at least part of the time, has not been shown on any of the claims in question.

The remaining contentions of the appellant have been considered, and we concur with the Bureau that the issues raised are immaterial to the question of discovery and, therefore, immaterial to the outcome of this case. With respect to the request for oral argument, the appellant has not shown that such argument would bring to light any material facts which it has not already presented or had an opportunity to present or that it would serve any useful purpose, and the request is hereby denied.

As the Bureau has already pointed out, the determination here need not prevent further efforts by the appellant to explore and develop the mineral deposits which may be found within the limits of its claims. The appellant is free to undertake the drilling program recommended by Wright. As long as the land remains open to the operation of the mining laws, the claimant is protected in its right to such deposits as may be found, but until a patent is issued, its use of the land embraced

by the claims is limited to mining and other uses of the land incidental to mining.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A (4) (a) ; 24 F.R. 1348), the decision appealed from is affirmed.

ERNEST F. HOM,  
*Assistant Solicitor.*

## APPEAL OF R. A. HEINTZ CONSTRUCTION COMPANY

IBCA-403

*Decided June 30, 1966*

**Contracts: Disputes and Remedies: Jurisdiction—Contracts: Performance or Default: Release and Settlement—Rules of Practice: Appeals: Dismissal**

Where the exceptions to a "Release on Contract" specifically designate particular claims and amounts as being excluded from the effect of the release, a further claim made thereafter, that cannot reasonably be considered to be within the claims enumerated in the exceptions is barred by the release provisions and will be dismissed.

**Contracts: Construction and Operation: Changed Conditions—Contracts: Performance or Default: Compensable Delays—Contracts: Disputes and Remedies: Equitable Adjustments**

Where changed conditions are encountered that not only necessitate additional work which is covered by unit prices, but also cause a delay in the commencement of a succeeding stage of the work, costs incurred in the performance of the succeeding stage and claimed to have resulted from such delay (wage differential and overtime bonus payments and the expense of moving equipment) are not directly related to the changed conditions and may not be included in an equitable adjustment.

**Contracts: Construction and Operation: Changed Conditions—Contracts: Construction and Operation: Estimated Quantities—Contracts: Disputes and Remedies: Equitable Adjustment**

Under a contract requiring the performance of grouting work on a dam foundation, where the quantities of grout to be placed could not be accurately estimated in advance of bidding and where a changed condition was found to exist which was manifested by the acceptance in deeper pervious formations of excessive quantities of grout, the allowable costs resulting from continuous grouting required on the project will include only such costs as are in excess of the expenses that should have been anticipated taking into account contract provisions calling for continuous grouting and other relevant factors.

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## BOARD OF CONTRACT APPEALS

The R. A. Heintz Construction Company has filed an appeal from a contracting officer's decision denying claims that were made because drilling and grouting work overran certain estimated quantities listed in the contract, and because continuous grouting work (around-the-clock) was required for a time on the project. The contract, dated December 8, 1959, called for construction of Prosser Creek Dam in Nevada County, California, was in the estimated amount of \$2,181,323.50, and was prepared on standard construction contract forms, including the General Provisions, Standard Form 23A (March 1953 edition).

Grouting work on the project was started in August 1960. In a letter dated March 13, 1961,<sup>1</sup> the appellant's general superintendent informed the Bureau of Reclamation:

The purpose of this letter is to notify you of a Change of Conditions as set out in Paragraph 4 of the General Provisions for the above captioned [Prosser Creek] project. An over-run of quantities has already been encountered on Bid Items No. 27-28-31. These over-runs have delayed construction and indications are that it is possible that further delays from this cause will affect the contract completion date.

The portion of the General Provisions that is referred to in the above quotation is Clause 4, Changed Conditions, which states in part as follows:

The Contractor shall promptly, and before such conditions are disturbed, notify the Contracting Officer in writing of: (1) subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract. The Contracting Officer shall promptly investigate the conditions, and if he finds that such conditions do so materially differ and cause an increase or decrease in the Contractor's cost of, or the time required for performance of this contract, an equitable adjustment shall be made and the contract modified in writing accordingly. \* \* \*

The Government's construction engineer in his reply<sup>2</sup> to the appellant's notification of changed conditions took the position that pressure grouting is by nature work which can vary from pre-bid estimates by substantial amounts, and concluded that the quantity overruns

<sup>1</sup> Government's Exhibit No. 7.

<sup>2</sup> Government's Exhibit No. 8.

should have been anticipated by Heintz. In addition, he pointed out the warning in Paragraph 69 of the specifications:

\* \* \* The amount of drilling and pressure grouting that will be required is uncertain, and the contractor shall be entitled to no extra compensation above the unit prices bid in the schedule by reason of increase or decrease of the schedule quantities.<sup>3</sup>

### *The Overruns*

The tabulation below shows the quantities and unit prices for the work involved in the overruns:<sup>4</sup>

Item	Schedule Quantity	Actual Quantity	Unit Price
26	4,500 lin. ft.----- Drilling grout holes in stage between depths of 0 foot and 30 feet.	6,653.1 lin. ft.--	\$2.50 per lin. ft.
27	2,300 lin. ft.----- Drilling grout holes in stage between depths of 30 feet and 60 feet.	6,658 lin. ft.---	\$2.50 per lin. ft.
28	1,900 lin. ft.----- Drilling grout holes in stage between depths of 60 feet and 110 feet.	8,352.6 lin. ft.--	\$2.50 per lin. ft.
31	13,000 sacks----- Pressure grouting foundations.	65,482 sacks---	\$2.00 per sack.

There also were 93 more "hookups to grout holes and connections" than the 150 shown as an estimated quantity on the bid schedule.

### *The Claims Attached to the Release Given by Heintz*

To review, the appellant gave general notice of changed conditions in March 1961, indicating that the overruns had "delayed construction" and pointing out the possibility that further delays from overruns

<sup>3</sup> The following portion of Paragraph 70 of the specification also should be noted:

"\* \* \* Unless otherwise directed, the first holes in the grout cap for the dam and spillway shall be spaced widely and shall be drilled and grouted before the intermediate holes are drilled and grouted, and in this manner the drilling and grouting of all holes shall be completed with such final spacing of the holes as the grouting results show to be necessary. After holes in a region have been drilled and grouted, it may be found necessary to drill additional grout holes. No allowances above the unit prices bid in the schedule will be made for the drilling of such holes or for the expense of moving equipment to other operations and returning to a previously drilled area."

<sup>4</sup> The parties are in agreement that the figures shown on this tabulation are correct.

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would affect the contract completion date. The Bureau's construction engineer replied in early April 1961 that the overruns should have been anticipated. The appeal record discloses that approximately 21 months elapsed before further action was taken on the matter. In executing a "Release on Contract" dated January 12, 1963, Heintz excepted a claim "amounting to the sum of Sixty Five Thousand six hundred ninety six and 11/100 (\$65,696.11)." A claim letter attached to the release was dated January 10, 1963, and advised that completion of the contract had allowed Heintz to review its record of construction costs and other matter connected with the project.

Careful examination of the wording of the claim letter (exception to the release) is required in this appeal, since the Board will not grant relief for a claim or rights that were not reserved when the release was given. Pertinent portions of the claim letter are as follows:

\* \* \* This claim is based on the additional costs incurred and the production delays caused by the sizeable overrun of bid quantities related to the grouting phases of the contract. \* \* \*

The orderly and economical prosecution of our construction efforts would have required the completion of the drilling and grouting phase of this work during the 1960 work season so as to enable us to complete the dam embankment phase early in 1961. The reason for our failure to accomplish the program however can be illustrated [a tabulation of the dollar amounts involved in the overruns is included] \* \* \*

As shown by the foregoing tabulation, grouting had overrun 58.5% by the end of the 1960 work season. The effect of this overrun was to require continuous, around-the-clock pumping of grout. This method, however was changed at government direction shortly after the commencement of the 1961 work season. [A listing of \$7,584.31 in claimed additional costs (overtime bonus and premium pay related to multiple shifts) related to the continuous grouting is included in the claim letter at this point.]

Because of the production delay caused by the grout overrun, we were unable to commence dam embankment work until July of 1961. A careful study of this development reveals that a minimum of 37 working days were lost in 1961 and set ahead into 1962 resulting in additional costs due to industrial wage increases. [The claim letter then explains in several paragraphs the appellant's method of calculating \$31,152.38 wage differential and overtime bonus costs assertedly incurred because of "lost production time".]

As an outgrowth of the grout overrun and resultant loss of production time, it was necessary to return equipment to the jobsite in 1962. \* \* \* It is our contention that only 38 percent of the equipment moved in 1962 was necessary for proper completion of the project had the forementioned difficulties not occurred. Our claim for additional compensation therefor, is limited to the remaining 62 percent of the equipment moving cost for the year 1962 or \$26,959.40.



Heintz concluded its claim (exception) letter as follows:

A summary of the foregoing claims for additional compensation is as follows:

Overtime bonus and multiple shift premium-----	\$7, 584. 31
Wage differential between 1961 and 1962 and overtime bonus for 1962-----	31, 152. 38
Equipment moving charges—1962-----	26, 949. 40
Total claim-----	\$65, 696. 11

### *The Effect of the Release Upon Claim No. 3*

The claim related to performance of embankment work at a later time than was contemplated at the time Heintz bid on the project (the "first claim"), and the claim requesting reimbursement for overtime and premium wages paid to employees for the performance of continuous grouting work (the "second claim") are excepted in the "Release on Contract" dated January 12, 1963. At the hearing on this appeal and in briefs the appellant's attorneys have advanced a third claim, based on the Changed Conditions clause.<sup>5</sup>

The Department Counsel has taken the position from the first mention of the third claim that it is barred by the release, contending that the release is specific both as to claim amount and claim items (embankment operation in 1962 and around-the-clock grouting).

To support the third claim counsel for the appellant have pointed to the acknowledged overruns of deeper drilling and grouting, plus evidence (Tr. 133, 156 and 199) that such work is more costly than drilling and grouting at shallow depths. The appellant's view that the caveatory and exculpatory clauses specifically referring to the drilling and grouting work should be ignored is more persuasive for grouting than for drilling. This is because only one unit price could be bid for the cement that was grouted into the foundations—this price (per sack of cement) was applicable to grouting work whether it was shallow or deep. The record does not disclose whether the subcontractor hired by Heintz to perform the pressure grouting requested Heintz to make an adjustment because of the grouting overruns, although there were discussions between those parties about the overruns. As a general matter from the standpoint of a grouting subcontractor a high "take" of grout is a good situation (Tr. 142-143).

<sup>5</sup> The parties have stipulated as to all three claims that in this decision the Board will consider only the question of the Government's liability. If the Board rules that the appellant is entitled to an equitable monetary adjustment, the matter is to be returned to the parties for negotiation of the amount due.

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As to drilling the appellant was given ample opportunity to submit a higher price for work that was more costly. Item 26 was for drilling grout holes between 0 and 30 feet, Item 27 was for such holes between 30 and 60 feet and Item 28 was for the same work between 60 and 110 feet. The appellant chose to bid *the same unit price*, \$2.50 per lineal foot, for each of the three stages.<sup>6</sup> The Board notes these facts in passing only, since the appeal record provides no basis for a ruling that the third claim was excepted from the release. The failure to except an item from settlement in a release bars a claim based upon such item.<sup>7</sup>

A great deal of latitude was allowed to the appellant in its effort to show that the third claim should be considered by the Board. The background of the formation of a release and conduct of the parties with respect to it may be inquired into in order to determine what they intended when it was executed.<sup>8</sup> There is no indication that Heintz intended to reserve the third claim. Instead, it appears that the decision to press that claim was made after the release had been given.

Because the appellant's third claim was not excepted in the release the Board cannot consider it; therefore it is dismissed.

#### *Claim No. 1*

This claim is for excess costs assertedly caused by the overruns in Item 27 (grout hole drilling between 30 and 60 feet), Item 28 (grout hole drilling between 60 and 110 feet) and Item 31 (pressure grouting). The claim reflects the appellant's argument that a day consumed in additional drilling and grouting required the embankment fill to be started one day later. The attorneys for the appellant refer to a changed condition as the "triggering factor" for the claim, and state that the associated required performance of quantities of drilling and grouting far in excess of those estimated in the contract should be treated as a constructive change. The claimed changed conditions is described as:

<sup>6</sup> In *Otis Williams and Company*, IBCA-324 (September 5, 1962), 69 I.D. 135, 1962 BCA par. 3487, a contractor was found to have been improvident in bidding \$1.50 per unit for work that he had estimated would cost \$3.50 per unit, in the hope that any loss resulting from such action would be "averaged out" by returns from an overbid on another item.

<sup>7</sup> *Monarch Lumber Company*, IBCA-217 (May 18, 1960), 67 I.D. 198, 60-2 BCA par. 2674.

<sup>8</sup> *Southeastern, Inc.*, ASBCA Nos. 7677 and 8614 (September 23, 1963), 1963 BCA par. 3904.

\* \* \* the very material difference between (a) the amount or degree of porosity, voids, interstices, cracks, fissures, and other openings, capable of accepting grout under pressure, in the natural undisturbed surface material beneath the main dam embankment, as such amounts were indicated in the contract; and (b) the extent of such openings, etc. actually encountered during construction. \* \* \*

There is virtually nothing in the record to support a holding that a "second category" changed condition existed on the project. One of the appellant's witnesses, a foreman for the grouting subcontractor, discussed other jobs where the drilling and grouting work at extreme depths did not increase beyond the original estimates to the extent that it did at Prosser Creek; however, he conceded (Tr. 139) that it is a "common and recognized thing" to expect a wide variation in quantities of "takes" of grout in the drilled holes at different dams. Only one of the other foundations on which he had supervised grouting work was composed of agglomerate rock. The logs of explorations for the deeper portions of the dam foundation involved in this appeal showed that the grout would be introduced into an agglomerate rock formation.

Actually the Government in making its estimates of quantities for grout hole drilling and pressure grouting seems to place little reliance on information derived from its site investigations. A civil engineer from the Construction Supervision Branch of the Chief Engineer's Office (Bureau of Reclamation) testified that neither geological information nor an analysis of exploratory holes is a reliable guide for grouting work. His conclusion, based on many years of overseeing that type of work, is that the result (in grouting) "may, and very often does, vary immensely from the indications shown by the preliminary investigation work." (Tr. 21)

The Government's expert also stated that the only proper way to conduct a grouting job is to base instructions as to drilling and placement of the cement on what occurs as the grouting operation proceeds—"trial and error." (Tr. 31) The Bureau has had projects where the grout "take" was as low as fifteen to twenty percent of the estimated "take" set forth in the specifications; on others, the actual take was several hundred percent more than was estimated. (Tr. 33)

Rather than relying primarily on the results of preliminary site investigations, the Bureau follows a standard based upon an "experienced guess." (Tr. 47) As a general average, grout "take" is expected to be approximately 1.0 sacks of cement per foot of drill hole. That 1.0 sack figure is sometimes increased if preliminary investigations indicate that a formation is more open or pervious than the average formation. (Tr. 33-34) Such an increase was deemed to be warranted

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for the Prosser Creek dam, the Government's estimate having been calculated on the basis of 1.5 sacks of cement per foot of drillhole. The employee who was assigned by the appellant to prepare its bid was able by a calculation taking into account the dimensions of the area to be grouted, the number of hookups and the depths shown for the drilled grout holes, to assess the grouting work "on the same plane that the man who designed it was thinking when he set up the bid quantities." (Tr. 204)

The Government's grouting experts who reviewed the large overruns in drilling for grout and in grouting encountered by the appellant were not surprised that they were necessary. (Tr. 42) The Board agrees with the appellant, however, that the Government's estimates must mean something. We find that the capacity of the pervious formations to accept grout greatly exceeded that which should have been expected in the light of the Government estimates and other data available to bidders on the project. The Board concludes that these pervious deep formations constituted a changed condition of the first category within the meaning of Clause 4 of the contract to the extent that the actual quantities of Bid Items 27, 28 and 31 required in the work exceeded 250 percent of the respective estimates set forth in the schedules. The inherent uncertainties that attend any grouting job, the fact that the Government provides an opportunity for bidding different prices for deeper drilling work than for drilling in the upper stages, and the inclusion of clauses giving specific warning as to the uncertainty of the amounts of drilling and grouting, prevent a conclusion that overrun percentages in ranges lower than 250 percent signaled the existence of a changed condition.<sup>9</sup> For reasons to be stated these findings will not benefit the appellant with respect to the costs included in Claim No. 1; however, they provide support for a partial allowance of Claim No. 2.

The Board will not sanction payment of the kind of costs that are included in the appellant's first claim. The grout overruns in 1960 did, we conclude, cause a delay in the commencement of dam embankment work. The appeal record shows that this delay was between 15 and 20 calendar days rather than the 37 production days that the

<sup>9</sup> The Board's finding is supported by a statement in the appellant's letter dated March 21, 1963 (attached to Government's Exhibit No. 6, the findings of fact), that a reasonable time for starting the dam embankment would have been not later than June 1, 1961, "with a normal expectancy of overrun in the grouting items." Government's Exhibit No. 15 shows that immediately prior to June 1, 1961, Heintz had performed almost 2½ times the quantity of grout hole drilling between depths of 60 feet and 110 feet shown on Item 28, and almost three times the quantity of pressure grouting (foundations) shown on Item 31.

appellant claims to have lost.<sup>10</sup> There is no provision in the contract under which wage differentials, overtime bonus payments and expenses of returning equipment for the succeeding stage of work (embankment) are compensable. The reason for this conclusion is stated in *Electronic and Missile Facilities, Inc.*, ASBCA No. 9866 (January 11, 1966), 66-1 BCA par. 5307, as follows:

\* \* \* This item presents alleged costs of a consequential type not ordinarily payable as part of an equitable adjustment in price. See *United States v. Rice*, 317 U.S. 61; *Chouteau v. United States*, 95 U.S. 61 (1877); *H. E. Crook Co. v. U.S.*, 270 U.S. 4 (1926); *U.S. v. Howard P. Foley Co.*, 329 U.S. 64 (1946). Simply stated, this doctrine precludes payment under the Changes article for costs of work not changed. It has been invoked not only in cases of alleged delays to such unchanged work, but where, as here, there was alleged consequential impact upon such work. [Citing cases] \* \* \*

The same rule has been followed in decisions of this Board. *Weldfab, Inc.*, IBCA-268 (August 11, 1961), 68 I.D. 241, 61-2 BCA par. 3005; *Peter Kiewit & Sons' Co.*, IBCA-405 (October 21, 1965), 72 I.D. 415, 65-2 BCA par. 5157. The Government incorporated in the Heintz contract a provision (Clause 11 of the General Conditions) entitled "Suspension of Work," but it is not the standard "Suspension of Work" clause that authorizes payment for unreasonable hindrance or delay; instead it is the antediluvian type that the Board has determined<sup>11</sup> does not grant authority to make an equitable adjustment. Claim No. 1 is denied.

#### *Claim No. 2*

The appellant's second claim is for continuous "around the clock" pumping of grout. The amount sought (\$7,584.31) represents premium and overtime bonus payments.

The grout pumping operation started on August 10, 1960. On the next day the appellant, pursuant to instructions from the Government, adopted the procedure of placing grout on an around-the-clock basis when this was necessary to complete work at a given level. The 110-foot design depth and 200-pound maximum pressure established in the specifications were not exceeded. The requirement for continuous grouting was in effect until October 3, 1960. On that date a Government grouting expert was asked for advice on grouting procedures by

<sup>10</sup> The appellant did not utilize a week in the fall of 1960 and another week in April 1961, to perform grouting work, even though the weather at those times was suitable for such work. Thus, a major portion of the 15 to 20 days could have been avoided by a reasonably careful scheduling of work.

<sup>11</sup> *Weardco Construction Corp.*, IBCA-48 (September 30, 1957), 64 I.D. 376, 57-2 BCA par. 1440.

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the construction engineer assigned to the project. Because experience on the job had disclosed the existence of a permeable layer requiring grouting at a considerable depth, the expert determined that intermittent grouting of the holes which accepted large quantities of grout would produce a satisfactory result. The Government's grouting expert who made this decision testified at the hearing on this appeal that the change in procedure to intermittent grouting would not have been warranted prior to October 3, 1960, on the basis of the information that was available.

The contractor was given the following instructions concerning the pressure grouting of foundations, in Paragraph 73 of the specifications:

\* \* \* Each drilled grout hole and grout connection for pressure grouting, as described in Paragraph 69 shall have grout composed of cement and water forced into it under pressure. Pressure as high as practicable but which, as determined by trial are [sic] safe against rock or concrete displacement, shall be used in the grouting. The proportions of cement and water used in mixing the grout, the time of grouting, the pressures used for grouting, and all other details of the grouting operations shall be as determined by the contracting officer.

\* \* \* The apparatus for mixing and placing grout shall be of a type approved by the contracting officer and shall be capable of mixing effectively and stirring the grout and forcing it into the holes or grout connections in a continuous, uninterrupted flow at any specified pressure up to a maximum of 200 pounds per square inch. \* \* \* The grouting equipment shall be maintained in a satisfactory manner and so as to insure continuous and efficient performance during any grouting operation. \* \* \* Provision shall be made to permit continuous circulation and accurate control of grouting pressures and grout flows into the grout holes.

\* \* \* The grouting of any hole shall be continued until the hole or grout connection takes grout at the rate of less than 1 cubic foot of the grout mixture in 20 minutes if pressures of 50 pounds per square inch or less are being used, in 15 minutes if pressure between 50 to 100 pounds per square inch are being used, and in 10 minutes if pressure between 100 and 200 pounds per square inch are being used. So far as practicable, the full grouting pressures shall be maintained constantly during grout injections. However, as a safeguard against rock or concrete displacement or while grout leaks are being calked, the contracting officer may require the reduction of the pumping pressure or the discontinuance of pumping. \* \* \*

Thus, there are specific contract provisions requiring the grouting of a hole to be continuous. The intermittent pumping, which relieved the appellant of the necessity to make premium and bonus payments, is not specifically authorized by the specifications.

The grouting subcontractor's superintendent, in response to a question relating to his expectation as to the number of shifts to be worked per day, testified:

When I went on the job, I considered I would have to do what the Bureau required us to do.

The Government relaxed the contract's requirement for continuous grouting early in the contract performance period. Intermittent grouting was allowed for holes which accepted more than 1,000 sacks of cement. This was done in early October 1960, as the result of the acceptance, at Hole No. 83 of approximately 5,000 sacks. (Tr. 100) Only three holes that took more than 1,000 sacks had been grouted prior to the issuance of the direction which relaxed the continuous grouting requirement—one of those holes took 1,837 sacks and the other two took approximately 2,000 sacks.

There is no formula under which we can establish the exact point of supersession of Clause 4 over the contract's requirement for continuous grouting. However, an adjustment should be made because the high take of Holes 1, 2, 3 and 83 resulted from the extremely pervious nature of the foundation's deeper zone that required grouting. The Board finds that no adjustment should be made for the grouting on a continuous basis of the first 800 sacks of cement at each of those four holes. An equitable adjustment should be made at each of the four holes for premium and overtime bonus payments incurred in continuous pressure grouting work directed by the Government to the extent that such work occurred after 800 sacks had been grouted at each hole. The remainder of Claim No. 2 is denied.

### *Conclusion*

Claim No. 1 is denied. Claim No. 2 is sustained in part and the parties should negotiate the amount to be paid. Claim No. 3 is dismissed.

I concur:

DEAN F. RATZMAN, *Chairman.*

I concur:

THOMAS M. DURSTON, *Deputy Chairman.*

WILLIAM F. MCGRAW, *Member.*

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## STATE OF UTAH

A-30266, A-30333 *Decided July 11, 1966*

Coal Leases and Permits: Generally—Mineral Lands: Generally—Mineral Lands: Leases—School Lands: Indemnity Selections—Words and Phrases

Lands within coal leases are considered to be "producible" within the meaning of Rev. Stat. § 2276, as amended, where there is a well-defined and large deposit of coal outcropping on the land which can be easily strip-mined from the outcrops. State indemnity selections for such lands or for any other lands included in the leases are properly rejected.

## APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The State of Utah has filed two separate appeals to the Secretary of the Interior from decisions of the Chief, Branch of Land Appeals, Office of Appeals and Hearings, Bureau of Land Management, dated February 6, 1964, and June 24, 1964, which affirmed separate Utah land office decisions rejecting in whole or in part the State's selection lists for indemnification of deficiencies in its school land grants. The rejection was on the ground that the lands involved are in coal leases which are in a producible status.<sup>1</sup>

<sup>1</sup> In the appeal, A-30266, from the decision of February 6, 1964, the land office decisions were rendered on either November 26, 1963, or December 2, 1963. The serial numbers of the State selections involved, the State list number and the serial numbers of the conflicting coal lease or leases are as follows:

<i>State selection</i>	<i>Selection list</i>	<i>Coal lease</i>
Utah 0115808.....	3504	Salt Lake 064507
		Utah 065012
		Utah 083272
Utah 0115815.....	3509	Salt Lake 064507
		Utah 060745
Utah 0115816.....	3510	Salt Lake 058575
		Utah 060745
		Utah 065012
Utah 0115817.....	3497	Utah 060746
		Utah 083072
Utah 0115818.....	5498	Utah 060746
Utah 0115819.....	3499	Utah 060746
Utah 0115820.....	3500	Utah 060746
Utah 0115885.....	3512	Utah 060746
Utah 0115886.....	3513	Utah 060745
		Utah 060746
Utah 0115889.....	3516	Utah 060745
Utah 0115899.....	3511	Utah 065012

In the appeal, A-30333, from the decision of June 24, 1964, the land office decision was rendered March 10, 1964. State selection Utah 0115814, List 3508, was rejected as to lands within coal leases Utah 060745 and 060746.



The State's indemnity selections were filed pursuant to Rev. Stat. § 2276, as amended by the act of August 27, 1958, 72 Stat. 928, and as further amended, 43 U.S.C. § 852 (1964). Subsection (a) (1) of section 2276 provides, in effect, that the State may select mineral lands to the extent that the selection is being made as indemnity for mineral lands lost to the State because of appropriation prior to survey. Subsection (a) (3), which is controlling in this case, provides in part as follows:

Land subject to a mineral lease or permit may be selected if none of the land subject to that lease or permit is in a producing or producible status \* \* \*.

In concluding that the lands within the coal leases are in a producible status and thus not available for State selection according to this provision and also the pertinent regulation, 43 CFR 2222.1-1(c) (formerly 43 CFR 270.1(c)), the Bureau indicated that the United States Geological Survey has reported that the lands within the coal leases have been adequately prospected by drilling, with all of the leases containing mapped coal outcrops, and all containing large reserves of coal which can be readily mined by open cast methods. In the decision of June 24, 1964, it is stated that it would be a very simple matter for a bulldozer to strip the overburden from the coal in less than a day and commence drag-line coal mining operations that same day, and that therefore the coal is available for immediate mining in commercial quantities.

The State admits that the lands covered by the coal leases are capable of being strip mined. However, it contends that no coal has ever been produced or is being produced from the selected lands and that even in using the open cast method initial preparation is necessary to expose the veins to sufficient extent to make recovery feasible. It states that there is required "a facility and development incident to recovery which must be established prior to the time actual extraction can be undertaken."

The State also contends that the Bureau is applying the test given in Solicitor's opinion M-36645, 70 I.D. 71 (1962), which stated that if lands containing a valuable and accessible deposit of mineral in such quantity and quality as to warrant the expenditure of funds for extraction and production is subject to a mineral lease, the land is in a "producible status" within the meaning of subsection (a) (3) of Rev. Stat. § 2276, regardless of the fact that additional development work is necessary to extract the mineral. Instead, the State contends, this test was rejected, and the true test is that stated by the Attorney

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General in his opinion of February 7, 1963, 70 I.D. 65, which is that lands are not in a "producible status" and ineligible for indemnity selection "until the mineral has been or can be extracted in commercial quantities." Those opinions involved lands which had been core-drilled and found to have a valuable underground deposit of potash within them. Large expense had been incurred by the lessee in driving a mine shaft toward the deposit, but, at the time the State made its selection, the shaft still had to be extended at least 2,000 feet to reach the deposit (see Solicitor's opinion M-36626, 70 I.D. 82 (1961)). The Attorney General emphasized in his opinion that as the State had filed its applications for selection prior to a time when the potash could be mined from the selected lands, approval of the selection was not barred by the statute (70 I.D. 70).

The Bureau, in its decisions below, cited the Attorney General's test in reaching its conclusions. Therefore, there is no difference here with respect to the test to be applied, but only as to its application to the particular factual circumstances involved here.

Although the State makes general statements as to the need for preparatory work to be done before coal can be extracted from the lands, it does not show any specific facts which would demonstrate this need. From the language in its appeals it appears that the State, in considering whether lands in a lease or permit are in a producible status, would limit the consideration to those lands which it has selected and would not inquire into the status of other lands in the lease or permit which have not been selected by it. However, the language of the statute does not contain such a limitation. Subsection (a) (3) of Rev. Stat. § 2276 plainly states that land subject to a mineral lease or permit may be selected only "if none of the land subject to that lease or permit is in a producing or producible status." It does not state that land subject to a lease may be selected "if none of the *selected* land subject to that lease" is in a producing or producible status.

Essentially the same question as to whether the status of non-selected lands in a lease may affect the determination as to whether other lands in the lease may be selected by the State was considered in *State of Utah*, 71 I.D. 392 (1964). The question there arose as to whether land within an oil and gas lease which was not within a unit or participating area was subject to selection when other lands in the lease were unitized and in a participating area and would be considered as "producing or producible" under the statute. It was stated that:

Since paragraph (3) prohibits the selection of any lands in a lease if any of the lands in it are in a producing or producible status, lands which are part of a producing or producible lease cannot be selected no matter what their own status is. 70 I.D. 399.

It is clear under that ruling then that as to the lands selected by the State here which are within coal leases, it does not matter whether the particular selected lands can be deemed to be in a producing or producible status. They are not subject to selection if any of the lands subject to the leases have that status.

We turn then to a consideration of the coal leases involved in the State's selections. From information furnished by the Geological Survey it is apparent that a relatively flat-lying bed of coal, averaging 15 feet in thickness, exists in the leased lands, and that the overburden is readily amenable to stripping, with little, if any, blasting required. Most important, on lands within each of the coal leases there are outcrops of coal exposed. As to some of the leases these outcrops are on lands selected by the State, as well as other lands; as to other leases, there appear to be no outcrops on the selected lands, but there are on other lands within the lease. With the outcrops of coal exposed, all that need be done to produce coal is to take equipment to the outcrop and start extracting coal at once. As mining operations progress beyond the outcrop, overburden will have to be removed, but immediately the coal is capable of being produced without any development work necessary before any of the coal can be extracted. This is clearly distinguishable from the potash case where an extensive shaft had to be completed before any mineral could be extracted and, we believe, clearly establishes the status of the leased lands as being "producible" within the meaning of the Attorney General's opinion.

It may be noted too that coal lease Salt Lake 058575, which is included in State selection Utah 0115816, has produced coal in the past and that coal lease Salt Lake 064507, which is partially included in State selections Utah 0115808 and 0115815, produced coal prior to the date of the selections and is still producing coal.

Accordingly, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decisions appealed from are affirmed.

FRANK J. BARRY,  
*Solicitor.*

*July 20, 1966***DUNCAN MILLER****A-30547***Decided July 20, 1966***Mineral Leasing Act: Generally—Oil and Gas Leases: Generally—Asphalt and Bitumen Leases**

The provisions of section 21 of the Mineral Leasing Act for the leasing of bitumen and bituminous rock or sand do not conflict with the oil and gas leasing provisions of section 17 of the act and do not impair the contractual rights of an oil and gas lessee under the latter provision, and a protest against such alleged impairment of rights is properly dismissed.

**Oil and Gas Leases: Rentals—Oil and Gas Leases: Termination**

An oil and gas lease is automatically terminated under section 31 of the Mineral Leasing Act, as amended by the act of July 29, 1954, when the rental is not paid in full on or before the due date, even if payment is timely and the deficiency is slight.

**Oil and Gas Leases: Rentals**

The proper rental payment must be made when due for each oil and gas lease held, and a deficiency in the rental remittance for one lease cannot be cured by an excess remittance in the rental payment or the filing fee for another lease or lease offer.

**Oil and Gas Leases: Extensions**

Where a noncompetitive oil and gas lessee files an informal application for a 5-year extension and is allowed 30 days by the land office to file a formal application, upon the lessee's subsequent appeal from the land office decision and the final affirmation of that decision, the lessee will be allowed 30 days from the date of such final affirmation within which to comply or to have his lease declared terminated.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Duncan Miller has appealed to the Secretary of the Interior from a decision dated August 10, 1965, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed decisions of the New Mexico land office declaring certain noncompetitive oil and gas leases to have terminated and dismissing his protests against the impairment of his contractual rights under a number of oil and gas leases and dismissed, as to yet another noncompetitive oil and gas lease, a protest against termination of the lease.

The issues presented in this appeal are not complex. The manner in which they have been brought before the Department is. It is, therefore, necessary to consider the particular circumstances of each lease involved in the appeal.

The record shows that Miller, by a letter dated January 29, 1965, requested the New Mexico land office to confirm that "[l]eases in San Juan County, 21 N., 4 W. and 20 N., 10 W." properly carry the rights to bituminous sands or bitumen. In a letter dated February 5, 1965, he was advised by the land office that there were no such leases in the townships indicated. On February 26, 1965, Miller filed a protest against cancellation of his oil and gas leases New Mexico 0226969, 0235808 and 0245821, asserting that he had been billed for rentals on the leases, that the failure to confirm that bituminous sands were covered by the leases violated the terms of the leases, that he was entitled to appropriate relief, that the leases should be "re-defined," and that a refund of monies should be paid on them.<sup>1</sup> On March 1, 1965, he filed a request for suspension or waiver of rental for the three leases. On March 4, 1965, the land office dismissed Miller's protest as having no merit, and it held that leases New Mexico 0235808 and 0245821 terminated on February 28, 1965, for the reason that rental payments due on March 1, 1965, were not received in the land office.

The record shows that noncompetitive acquired land oil and gas leases New Mexico 043610 (Texas) and New Mexico 043611 (Texas) were issued to the appellant effective August 1, 1959, and that on July 28, 1964, the appellant filed an informal application for extension of the leases. By a decision dated August 20, 1964, the New Mexico land office required him, within thirty days after receipt of the decision, to file proper lease extension forms together with the sixth year's rental payment. Miller appealed from that decision to the Director, Bureau of Land Management, asserting that the lease extension forms required the legal description of the lands included in the leases which, in the case of these leases, he asserted, would require voluminous metes and bounds descriptions which would be unnecessary and burdensome. In a supplement to his appeal, filed on May 17, 1965, he stated that the same objections which were made in his protest on leases New Mexico 0235808 and 0245821 were applicable here as well.

Miller's appeal, as it pertains to lease New Mexico 022266-B (Oklahoma), is a novel departure from the routine, since, in this case, he seemingly appealed to the Director of the Bureau of Land Management from a decision of the Department. By a decision dated May 13, 1965 (*Duncan Miller*, A-30300), the Department reversed, in part, a

<sup>1</sup> The leases were all issued, effective March 1, 1962, for lands in the townships mentioned in Miller's letter of January 29, 1965. The fourth year's rental payment was subsequently made for lease New Mexico 0226969, and that lease is not involved in the present appeal. No rental payment, however, was made for the other two leases.

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decision of the Bureau holding that lease New Mexico 022266-B (Oklahoma) had expired by operation of law on September 30, 1963, the end of its initial five-year term, and allowed Miller 30 days from the date of the decision within which to file the required application form for an extension of the lease together with payment of rental for the sixth and seventh lease years.<sup>2</sup> On June 7, 1965, Miller filed a purported appeal to the Director, Bureau of Land Management, asserting that the Department's decision had become moot since, in the meantime, there had been rulings by the land office that such leases do not carry the bituminous sand or bitumen rights, and he asserted that the lease terms are all inclusive as to any oil that may be obtained from the lease by any means and that requiring the lessee to accept a lesser estate would clearly constitute a breach of the lease terms.

Oil and gas lease Wyoming 0114267 was issued to the appellant effective July 1, 1961. The record indicates that the rental payment for the fourth lease year, commencing July 1, 1964, was deficient in the amount of \$1. By a letter dated July 3, 1964, Miller requested the Wyoming land office to adjust the rental for the lease, asserting that the rental payment tendered was apparently one dollar short, that this should be construed as a debt owed the United States, that at the same time the land office had in its possession surplus funds from simultaneous filings by Miller and that money from those surplus funds could be credited to cure the deficiency. Before any action was taken on Miller's request by the land office Miller filed an appeal to the Director, Bureau of Land Management, protesting the termination of the lease. Subsequently, in a letter received in the land office on June 9, 1965, Miller adverted to the fact that the case was on appeal and requested that the terms of the lease "be certified as to the extent of bitumen or bituminous sands."

In affirming dismissal of the protests, the Office of Appeals and Hearings observed that the appellant did not specify in what manner his contractual rights under his leases had been violated, and it found no violation of the contractual obligations of the lessor to the lessee. Citing a memorandum dated February 24, 1965, from the Associate Solicitor, Division of Public Lands, to the Assistant Secretary of the

<sup>2</sup> In that case, as in New Mexico 043610 (Texas) and 043611 (Texas), *supra*, Miller filed an informal application for extension of his lease, resulting in a decision by the land office requiring him to submit the proper forms and required rental payment within 30 days which he thereafter appealed. The Department held that the taking of an appeal suspended the effect of the land office decision, thereby allowing Miller 30 days in which to comply after that decision was finally affirmed by the Department.

Interior, Public Land Management, it held that the United States has done nothing with respect to native-asphalt, solid and semisolid bitumen, and bituminous rock (including oil-impregnated rock or sands from which oil is recoverable only by special treatment after the deposit is mined or quarried) which diminishes the rights of an oil and gas lessee.

With respect to the status of the individual leases, the Office of Appeals and Hearings found, as to leases New Mexico 0235808 and 0245821, that the land office did not undertake to cancel the leases but that it held the leases to have terminated by operation of law for failure of the lessee to pay the advance rental by the anniversary date of the leases. The Office of Appeals and Hearings did not comment upon the correctness of the decision of the land office but affirmed it. As to leases New Mexico 043610 (Texas) and 043611 (Texas), it held that the appellant must comply with the land office decision of August 20, 1964. It explained, however, that the land description required for the application for extension need not be burdensome and that it need not satisfy the requirements for a lease offer but that it must be sufficiently clear to enable land office personnel to take appropriate action and that a statement specifying "all lands in lease" would be satisfactory if that is what is desired. Miller was allowed 30 days from the date of receipt of the decision in which to comply. The Office of Appeals and Hearings found that Miller had not complied with the terms of the Departmental Decision, *supra*, as to lease New Mexico 022266-B (Oklahoma) and that, under the terms of the decision, the lease terminated on September 30, 1963. It also held that, under section 31 of the Mineral Leasing Act, 41 Stat. 450 (1920), as amended, 30 U.S.C. § 188 (1964), failure to pay the entire rental when due results in the automatic termination of the lease (*Champlin Oil and Refining Co.*, 66 I.D. 26 (1959)), that the land office manager is only authorized to apply rental payments to leases for which payments are identified, and that the amount of rental deficiency in the case of lease Wyoming 0114267 is not a debt and may not be offset against surplus moneys paid by Miller on other accounts.

Miller has filed voluminous appeals over the past several years. His appeals are not noted for their clarity or for their orthodoxy, and this one is not an exception. In substance, if not in form, the appellant is challenging the right of the United States to provide by law for the leasing of deposits of oil-impregnated rock and sand independently of the provisions for the leasing of oil and gas deposits, and he is asserting that section 21 of the Mineral Leasing Act, 41 Stat. 445 (1920), as

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amended by section 7 of the act of September 2, 1960, 74 Stat. 790, 30 U.S.C. § 241 (1964),<sup>3</sup> is an infringement upon his rights as an oil and gas lessee under section 17 of the Mineral Leasing Act, 41 Stat. 443 (1920), as amended, 30 U.S.C. § 226 (1964).

The problem of distinguishing between oil and gas deposits and deposits of other oil-bearing substances was considered at length in the Associate Solicitor's memorandum cited by the Bureau. It was there recognized that a difficulty arises because the ultimate product to be obtained under an oil lease and, to a considerable extent, under a tar sands lease is oil and that there is no distinction existing in the ultimate product but that there is a distinction between the scopes of the two leases in (1) the substances from which that same ultimate product is derived, (2) the condition of the substances from which it is derived at the time that they are exploited under the lease, or (3) the methods by which that product is produced. It was further pointed out that the terms "gas" and "oil" are defined in the oil and gas operating regulations of the Geological Survey as follows:

*Gas.* Any fluid, either combustible or noncombustible, which is produced in a natural state from the earth and which maintains a gaseous or rarefied state at ordinary temperature and pressure conditions. 30 CFR 221.2(o).

*Oil, crude oil.* Any liquid hydrocarbon substance which occurs naturally in the earth, including drip gasoline or other natural condensates recovered from gas, without resort to manufacturing process. 30 CFR 221.2(p).

Thus, there is a distinct difference between oil and gas, as those terms are to be understood in connection with the mineral leasing laws and regulations of the United States, and other substances in which oil may be found, but from which it must be extracted by a wholly different process from any contemplated in the tapping of oil and gas deposits.

<sup>3</sup> Section 21, as amended, provides in pertinent part:

"(a). That the Secretary of the Interior is hereby authorized to lease to any person or corporation qualified under this Act any deposits of oil shale, native asphalt, solid and semisolid bitumen, and bituminous rock (including oil-impregnated rock or sands from which oil is recoverable only by special treatment after the deposit is mined or quarried) belonging to the United States and the surface of so much of the public lands containing such deposits, or land adjacent thereto, as may be required for the extraction and reduction of the leased minerals; under such rules and regulations, not inconsistent with this Act, as he may prescribe \* \* \*

"(c) With respect to native asphalt, solid and semisolid bitumen, and bituminous rock (including oil-impregnated rock or sands from which oil is recoverable only by special treatment after the deposit is mined or quarried) a lease under the multiple use principle may issue notwithstanding the existence of an outstanding lease issued under any other provision of this Act."

Prior to the amendment, section 21 provided only for the leasing of oil shale. The 1960 amendment added native asphalt, etc.



Section 1 of the standard oil and gas lease form, to which the appellant has made numerous vague references, gives the lessee "the exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and gas deposits \* \* \*" in the lands leased. The right extends only to "oil and gas deposits," not to all hydrocarbons in the leased lands. The lease must be read in conjunction with the applicable statute and regulations. From the time of its enactment in 1920 the Mineral Leasing Act provided for the leasing of "oil or gas" in section 17 of the act and "oil shale" in section 21. Obviously a lease issued under either section did not carry any right to the mineral covered by the other. Thus appellant's leases, which were expressly issued pursuant to section 17, gave him no rights under section 21. Authority to lease solid and semi-solid hydrocarbons was added in 1960 to section 21. Clearly then appellant's leases which were issued subsequently carried no rights to those minerals. His leases which were issued prior to the 1960 amendment also carried no such right since no previously authority existed for leasing solid and semi-solid hydrocarbons. Also, as we have seen, under the definitions in the regulations only liquid and gaseous hydrocarbons would be included in the oil and gas deposits leased under the oil and gas lease.

It is our conclusion, then, that there has been no impairment of any contractual rights of the appellant, for the right to mine the mineral deposits subject to section 21 of the Mineral Leasing Act, *supra*, was never granted to the appellant under the terms of his oil and gas leases, whether such leases were issued prior or subsequent to the Mineral Leasing Act Revision of 1960, 74 Stat. 781, 30 U.S.C. § 181 *et seq.* (1964). Accordingly, the protests were properly dismissed.

Turning then to the question of what contractual rights remain to the appellant under the various leases in question, as we noted earlier, the Office of Appeals and Hearings made no specific findings on the merits of the determination by the New Mexico land office that leases New Mexico 0235808 and 0245821 terminated by operation of law upon the failure of the lessee to pay the fourth year's rental, due on March 1, 1965. The record does not show, however, that the rental was paid on either lease, and Miller does not assert that it was. Thus, it appears that those leases were properly terminated, and the fact that Miller filed a protest against "cancellation" of the leases in advance of the date on which rental payment was due did not in any way affect the automatic termination of the leases. See *Duncan Miller*, A-30122 (September 23, 1964). The termination date of the leases, however, should have been shown as March 1, 1965, rather than as February 28,

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1965, as indicated by the land office, since the rental could have been paid at any time during land office hours on the anniversary date of the lease, in effect, continuing the lease in force through that date. *Duncan Miller*, 66 I.D. 342 (1959).

With respect to lease Wyoming 0114267, the Office of Appeals and Hearings again, after setting forth the applicable law, failed to state precisely what the effect of that law was, when applied to the lease in question. The record, however, shows that the rental payment for the lease year commencing July 1, 1964, was deficient in the amount of one dollar, which the appellant has not disputed. The Department is without authority to prevent the automatic termination of a lease when the rental is not paid in full by the anniversary date of the lease. *Duncan Miller*, A-30067 (March 12, 1964); *Billy Mathis et al.*, A-30512 (July 6, 1966). As the Office of Appeals and Hearings pointed out, the land office has neither the duty nor the authority to apply surplus funds from one lease account to cure deficiency in another. See *Chester Carthel*, A-30496 (March 10, 1966). This lease, then, also terminated on its anniversary date, July 1, 1964.

With respect to lease New Mexico 022266-B (Oklahoma), the appellant asserts that the Bureau's decision completely neglected the substance of his appeal and ignored the points raised. It is sufficient to point out that if there was an appeal in this case it was an appeal to the Director, Bureau of Land Management, from a Departmental decision. Such an appeal cannot be entertained, and to the extent to which it was attempted it was properly dismissed. To the extent that the purported appeal may be considered a protest against section 21 of the Mineral Leasing Act, *supra*, it was also properly dismissed for reasons already set forth. As it does not appear that the appellant filed the required lease extension forms and rental payments in compliance with the Department's decision of May 13, 1965, *supra*, this lease was properly found to have expired on September 30, 1963, at the end of its initial five-year term. In any event, the two-year extension to which he would have been entitled had he complied would now have long since expired.

The appellant may preserve his existing rights with respect to the remaining two leases, New Mexico 043610 (Texas) and 043611 (Texas), by filing the required lease extension forms and the rental payments for the sixth and seventh lease years within 30 days from the date of this decision. If he does not do so, the leases will be considered to have expired by operation of law at the end of the initial five-year term. *Duncan Miller*, A-30300, *supra*.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision appealed from, as modified herein, is affirmed.

ERNEST F. HOM,  
*Assistant Solicitor.*

## UNITED STATES

v.

RICHARD DEAN LANCE

A-30553

*Decided July 27, 1966*

### Homesteads (Ordinary): Cultivation

Cultivation of a homestead entry must consist of acts and be done in such a manner as to be reasonably calculated to produce profitable results, and where the land is arid or semiarid and will not, in a normal year, produce a crop without artificial irrigation, cultivation which will meet the cultivation requirements of the homestead law must, of necessity, include the application of such amounts of water as may reasonably be required to produce a crop.

### Homesteads (Ordinary): Cultivation—Homesteads (Ordinary): Cancellation of Entry

Where the acts of cultivation performed for all but one year of the life of a homestead entry consisted of sowing seed on the land without disturbing the native vegetation, and where the entryman failed to apply artificial irrigation to desert-type land, without which he could not reasonably expect to produce a crop, his efforts cannot be considered to have been cultivation, and his final proof is properly rejected and the entry canceled.

### Equitable Adjudication

Equitable adjudication is properly denied a homestead entryman where it appears that there has not been substantial compliance with the cultivation requirements of the law.

### Federal Employees and Officers: Authority to Bind Government

Neither unauthorized acts by employees of the Bureau of Land Management nor erroneous information furnished by them can serve as the basis for conferring rights not authorized by law or for excusing the nonperformance of acts that are required by law to be performed before the vesting of a right.

## APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Richard Dean Lance has appealed to the Secretary of the Interior from a decision dated August 30, 1965, whereby the Acting Director,

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Bureau of Land Management, canceled his homestead entry Nevada 044610 and denied his request for equitable adjudication pursuant to Rev. Stat. §§ 2450 and 2457 (1875), as amended, 43 U.S.C. §§ 1161 and 1164 (1964).

Appellant filed his application on November 13, 1956, pursuant to Rev. Stat. § 2289 (1875), as amended, 43 U.S.C. § 161 (1964), for the E $\frac{1}{2}$ SE $\frac{1}{4}$ , SE $\frac{1}{4}$ NE $\frac{1}{4}$  and lot 1, sec. 2, T. 13 N., R. 26 E., M.D.M., Nevada. The application was allowed on February 15, 1957, and on June 9, 1958, the appellant attempted to file final proof on his entry.

By a decision dated December 23, 1958, the Nevada land office rejected appellant's final proof for the reasons that the appellant had cultivated only 14.5 acres of the 20 acres (one-eighth of the entry) necessary to satisfy the minimum requirements of the homestead law and that he had neither an irrigation well completed nor any other source of water for the land. The decision noted, however, that appellant had until February 15, 1962, to submit satisfactory final proof.

On April 4, 1962, appellant relinquished all of his entry except lot 1, sec. 2, after informing the land office on February 12, 1962, that "it is impossible to meet the requirements for the full 160 acres." On May 25, 1962, he filed final proof again for that one subdivision. By a decision dated June 12, 1962, the final proof was rejected, and the entry was canceled, upon a finding that the proof showed cultivation only during the first entry year and did not satisfy the requirement that cultivation must be performed each year, commencing with the second entry year, until final proof.

By a decision of July 12, 1962, the land office vacated its decision of June 12, 1962, on a finding that "the new evidence of cultivation you submitted on June 28, 1962, which was corroborated by your two witnesses, is deemed sufficient to now make your final proof acceptable." That evidence consisted of an affidavit that 10 acres of barley and oats were cultivated in 1958 and that 20 acres were cultivated in 1959, 1960 and 1961. Thereafter, by a decision dated August 3, 1962, the land office reinstated the entry as initially allowed. Appellant was informed that it would be necessary for him again to file final proof, that due to the tardiness of the proof he must file notice of his intention within 30 days and that his final proof, when received, would be forwarded to the Director, Bureau of Land Management, for equitable adjudication.

On October 24, 1962, appellant filed final proof for the third time, asserting therein that he had placed improvements on the land having a value of \$4,550, that he had resided on the entry since May 1, 1957,

and that he had planted 10 acres of barley, oats and rye grass in 1958 and 20 acres in each of the years 1959, 1960, 1961 and 1962. He stated that no crop had been harvested.

On December 24, 1963, the Bureau of Land Management filed a contest complaint against appellant's entry in which it was charged that the contestee had not complied with the requirements of Departmental regulation 43 CFR 166.23(a), as amended by Circular No. 2102, dated April 25, 1963, in that the entry is located in an area where the rainfall is inadequate and the contestee had not applied such amounts of water, by means of irrigation, to the land embraced in the entry as may reasonably be required to produce a crop. Pursuant to the complaint a hearing was held at Yerington, Nevada, on June 11, 1964, at which appellant appeared with counsel.

Appellant objected initially to the form and substance of the complaint, asserting that the regulation which formed the basis for the complaint was amended in April 1963, after the life of his entry, that the particular provision with which he was charged with failure to comply was added to the regulation subsequent to his entry and that he could only be held to compliance with the regulation in effect at the time he entered the land.<sup>1</sup>

The evidence presented by the Government at the hearing pertained primarily to the question of the necessity for irrigation of the entered land in order to produce crops. The Government's sole witness testified that no crops were grown in the area without irrigation but that in certain years, if the rainfall were just right, it would be possible to produce some crops without irrigation, that the average annual rainfall for the area is about 5 inches, and that in order to produce a profitable crop it would be necessary to have approximately 4 inches of rainfall at the right time during the growing season from May to September. He stated that 1958 and 1962 were good years (Tr. 14, 17-19, 27). The witness stated that he examined the entry in March and May 1963, that there was a habitable dwelling on the land, as well as other improvements, that there was a well, which was a dry

<sup>1</sup> The regulation, as cited in the complaint, provides that:

"Cultivation of the land in a manner reasonably calculated to produce profitable results is required for a period of at least 2 years. This must consist of actual breaking of the soil, followed by planting, sowing of seed, tillage for a crop other than native grasses, and, in areas where rainfall is inadequate, the application of such amounts of water as may reasonably be required to produce a crop. \* \* \*" 43 CFR 2211.2-3(a)(1), formerly 43 CFR 166.23(a).

The portions emphasized, and to which objection was made, were added to the regulation by amendment of May 2, 1963, 28 F.R. 4355, together with a slight change in the form of the first sentence of the regulation.

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hole, and that the brush had been removed from approximately 22 acres of the entry which had been plowed and which showed evidence of cultivation (Tr. 15-16, 23). He further stated that he did not see any evidence of any planting of barley, rye grass or oats when he examined the land, that if any planting had been done in 1962 evidence would still have been visible in 1963, but that evidence of planting and cultivation prior to 1962 would probably have been destroyed by that time (Tr. 27-28).

Appellant testified at the hearing that he made two attempts in 1958 to have a well drilled, that the first driller stopped at a depth of 27 feet after striking rock and that the second driller stopped after drilling 50 feet because of cavernous conditions. He further indicated that he did not have sufficient finances to continue further drilling efforts, and he testified that after his well failure he explained his problems to land office personnel and was informed that "there was such a thing as equitable adjudication in cases where you tried and failed through no fault of your own" (Tr. 50-54). He did not claim that a water supply had been developed on the entry and stated that he hauled water from a neighbor's place for domestic use (Tr. 53, 67). The results claimed from his cultivation efforts were essentially consistent with the testimony of the Government's witness as to what might be expected under the circumstances, that is, appellant's testimony indicated that, while he planted something on the land each year from 1958 through 1962, he successfully produced a crop only in 1958 (Tr. 68-69).

Subsequent to the hearing, appellant requested the Director, Bureau of Land Management, to assume jurisdiction of the case for consideration under the principles of equitable adjudication. The request was based upon the contention that some weight should be given to the findings of the Bureau's land examiner on August 9, 1963, that it appeared "that the entryman has shown good faith in 'proving up' his homestead" and "that failure to develop a well was beyond the control of the entryman" and upon the premise that the entryman was required to comply with a regulatory provision not in effect until after final proof had been filed. This request was granted without a decision by the hearing examiner.

In his decision of August 30, 1965, the Acting Director found that the lands embraced in the entry are in an area lacking sufficient rainfall for successful farming without an independent water supply, that the Nevada State Engineer advised on September 20, 1960, that a water well permit issued to the entryman had been canceled, that

the entryman had not shown that he had developed a source of water or that he had renewed his permit, and that these factors, coupled with the question as to whether the hand sowing of seed among the native grasses is "cultivation" within the means of the homestead laws and regulations, raise a question as to whether the entry was maintained in circumstances "not indicating bad faith." The Acting Director further held that "cultivation" means the actual breaking of the soil in preparation for the planting or sowing of seed, that statements of the entryman clearly showed mere token compliance with the law after the second entry year, that the entryman could not have had the least expectation that a harvestable crop would be raised, and that the mere sowing of seed among the native grasses (even if the soil had been broken) in a manner not likely to succeed could not be construed as compliance with the positive mandate of the homestead law, citing *Charles Edmund Bemis*, 48 L.D. 605 (1922). He concluded that the entryman's failure to comply with the requirements of the law was not due to some obstacle beyond his control, that there had not been substantial compliance with the law, and the entryman was not entitled to favorable consideration under the principles of equitable adjudication. Appellant was permitted, however, to file an appropriate application to purchase the land containing his building improvements.

The appellant incorporates his previous contentions in his present appeal. In addition, he contends that the Acting Director, upon the same record, reached a conclusion directly opposed to that recommended by the Bureau's field examiners in Nevada. He asserts, for example, that the Acting Director, applying a "non-bad faith" test, evidently concluded that the entryman acted in bad faith, while the Bureau's field personnel, in reports dated February 23, 1962, and August 9, 1963, concluded "that the entryman has shown good faith." Similarly, it is argued, the Acting Director stated that "we can only conclude that the entryman's failure to comply with the homestead law was not due to some obstacle beyond his control," as compared with the field examiner's conclusion that "[i]t appears, however, that failure to develop a well was beyond the control of the entryman." It is further asserted by appellant that:

1. Cultivation requirements were not even an issue at contest action, as they were met and found to be satisfactory by field examiner Nolan Roberts (22 acres in all) 1958 and 1959. When the well failed, BLM said no other cultivation necessary if it was harmful to the land. To secure well drillers' affidavit explaining why the well could not be developed, which I did. Failure of the

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well, due to underground caverns and rock, was certainly a problem beyond my control. (Roberts recommended title.)

Present well is serving my needs very well for home use, small orchard and garden.<sup>2</sup>

2. My problem was not through ignorance or mistake, as I followed instructions constantly from BLM. The only course was to file under equitable adjudication because of failure of the well, which could not be helped by anyone. At the time I filed for title, an irrigation well was requested, but was not a law. Well drillers' affidavit was considered proof of my good faith by Mr. Zundell (then head of BLM) who said I had complied satisfactorily, and that I should have already received title.

Contrary to appellant's assertion, cultivation requirements were indeed an issue in the contest proceeding. They were, in fact, the very basis for the initiation of the contest. The critical issue developed at the hearing, however, was not as to the amount of cultivation performed, for this was not challenged, but as to the nature of that cultivation, and, as to the latter, the record does not reveal a significant dispute over a factual matter. Thus, the issues of this appeal are, in essence:

(1) With what cultivation requirements was appellant required to comply?

(2) Did the cultivation which he performed satisfy those requirements?

(3) If not, in view of the particular facts of this case, is he nevertheless entitled to receive patent to the entered lands under the principles of equitable adjudication?

Initially, as we noted earlier, appellant challenged the standard which was applied in determining the sufficiency of his cultivation. The same contention which he has made with respect to the amendment of the Department's regulations to require the application of water to homestead entries of arid or semiarid lands was recently considered by the Department in *United States v. Cecil R. Reed*, A-30354 (September 29, 1965).<sup>3</sup> There it was found that the purpose of the amendment was clarification rather than change and that the added language of the amendment, since previously implicit, did apply to a homestead entry in Nevada which was allowed prior to the amendment. It was stated that:

<sup>2</sup> The well of which appellant speaks apparently was completed after the expiration of the life of the entry and subsequent to the hearing. There is no mention in the record of any well having been successfully completed for either domestic or agricultural use.

<sup>3</sup> The *Reed* decision has been challenged in an action entitled *Reed v. Udall*, Civil Action No. 1784, in the United States District Court for the District of Nevada.



In any event, \* \* \* it is clear \* \* \* that cultivation must be more than a pretense and it is equally clear that if artificial irrigation is not applied to desert type land, cultivation can be no more than a pretense. The appellant's contention that it is the desert land law and not the homestead law which is being applied here can thus be seen to be without merit. It is the homestead law as it pertains to desert-type land that is being applied.

The ruling in the *Reed* case is supported by a long line of Departmental decisions dealing with the question of cultivation (see *Ingelev J. Glomset*, 36 L.D. 255 (1907); *Charles Edmund Bemis*, *supra*; *United States v. Charles E. Stewart*, A-28966 (September 25, 1962); \* *Jess H. Nicholas, Jr.*, A-30065 (October 13, 1964)) and is dispositive of the same issue in the present case.<sup>5</sup>

Despite the fact that the regulation on cultivation was not amended to its present form until May 2, 1963, there is not the slightest doubt that the appellant was aware at the time his entry was allowed that the application of water, other than natural rainfall, was essential to any meaningful agricultural endeavor. At the time appellant applied for entry and at the time when his application was allowed, a pertinent regulation of the Department provided:

\* \* \* Public lands which are desert in character \* \* \* may, on the filing of an application under the general homestead laws, be classified for entry under those laws, provided the applicant makes a satisfactory showing that the land is susceptible of successful cultivation by irrigation and that the cultivation requirements of the homestead laws will be met. The applicant in such a case will be required to furnish satisfactory evidence of a water right and plans of irrigation. The available water supply, and the plan of irrigation, however, need be sufficient only to enable the applicant to meet the cultivation requirements of the homestead laws. 43 CFR, 1954 rev., 296.4.

In the land office decision of February 15, 1957, allowing the entry, appellant was required to furnish evidence of a water permit covering the entry. Such evidence was furnished on February 18, 1957.

When appellant filed his first final proof on June 9, 1958, the land office asked the Nevada State Engineer whether appellant had a current water permit for the land. The State Engineer responded that on October 4, 1957, appellant had filed an application to appropriate water for his entry. As noted earlier, when the final proof was rejected on December 23, 1958, one of the two grounds stated was

<sup>4</sup> Reversed on another ground. *Stewart v. Penny*, 238 F. Supp. 821 (D. Nev. 1965).

<sup>5</sup> The present case differs slightly on its facts from the *Reed* case. In the latter there was serious question as to whether the entryman had, in fact, performed even the acts of cultivation which he claimed. In the present case the appellant's statements with respect to work performed have not been challenged. The nature of the cultivation claimed, however, was essentially the same in both instances.

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appellant's failure to have a well or other source of water for use on the land.

At the hearing, appellant testified:

A. Yes, when I first signed up on the homestead, I talked to some people there, and they told me that a well would be needed because it was considered arid country, and I agreed with them, and I said that I certainly would want one.

Q. This was from the beginning, wasn't it?

A. Yes sir. I agreed that it would be the backbone of the place and I couldn't see why anyone would object to putting a well down unless he had some natural water which the place didn't have. (Tr. 46-47.)

This evidence definitely establishes that appellant was fully aware from the beginning that he needed a source of water to accomplish cultivation on his entry. He was chargeable with notice of the Department's regulation which permitted desert-type homestead entries to be allowed only if the applicant showed a right to sufficient water to meet the cultivation requirements. The fact that he applied to the State Engineer for permits demonstrates his awareness.

Clearly then the amendment of the regulation on cultivation in May 1963 to state explicitly that cultivation includes the application of water required to produce a crop in areas where rainfall is inadequate imposed no new requirement. It merely spelled out what had been implicit. Under the regulation as it existed prior to the amendment, appellant's attempted cultivation without the application of water would have been insufficient.

In truth appellant's sowing of seed on the entry, at least for the years subsequent to 1958, was not done with any serious thought that a crop would be successful. It was little more than a token gesture, appellant being more concerned with not harming the native grasses than he was with raising a crop. He admittedly did not plant the seed deep enough for fear he would damage the native grass. He knew that he was not planting in a manner most calculated to produce a successful crop, and he admitted frankly that he was not planting in a way to comply with the requirements of the homestead law.<sup>6</sup> That such purposeless effort should be termed cultivation seems inconceivable.

<sup>6</sup> With the exception of cultivation performed in 1958, the appellant's testimony was very vague with respect to both the extent of his efforts and the results of those efforts, as indicated by the following testimony given during cross-examination by counsel for the Government:

"Q. Do you recall the year of 1959, that you planted 20 acres that year of the same, barley, oats and rye grass. What kind of a crop did you get that year, do you recall?

A. I didn't do nearly as well. If I remember right, I had went back—during the discussions over in the Land Office I wanted to make sure that I complied. I said if I had to plant I certainly want to do it, but I understand that we have a windy season over there and with this well failure I might not have water to put on it by then, and I understand that the land blows pretty bad. I saw some of it blow while I was building in early

The appellant has not, in fact, claimed at any time that the cultivation which he performed satisfied the Department's requirements as they have been set forth here. It was because he acknowledged the fact that he had not met those requirements that he sought equitable adjudication of his final proof, and we turn now to a consideration of the applicability of that remedy in his case.

Appellant bases his petition for equitable adjudication upon the premises that:

(1) He followed all of the instructions which he received from the land office;

(2) His failure to develop a water supply for irrigation of the entry was due to circumstances beyond his control; and

(3) Bureau personnel attested to his good faith in attempting to develop his entry and to the fact that his failure to develop a well was due to no fault of his own.

The Secretary, or such officer as he may designate, is authorized by Rev. Stat. §§ 2450 and 2457, *supra*, "to decide upon principles of equity and justice, as recognized in courts of equity, and in accordance with regulations to be approved by the Secretary of the Interior" those cases in which "the law has been substantially complied with, and the error or informality arose from ignorance, accident, or mistake which is satisfactorily explained." The Department's regulations authorize such equitable adjudication where there has been substantial compliance with the law and "where the error or informality is satisfactorily explained as being the result of ignorance, mistake, or some other obstacle over which the party had no control, or any other sufficient reason not indicating bad faith." 43 CFR 201.1-1. These

'57, and they told me that you certainly wouldn't be required to do anything that is harmful to your land, and if you do have windy seasons over there and if clearing of the land causes it to blow that I could actually be exempt from planting. Of course I told them at that time that I didn't mind to plant it as long as I got it in as early as the year before, I like to see it there and it helps on the feed bill for chickens. We didn't have much stock because I was putting everything in the well, but it does help on the feed bill and I just like to see it out there, so I told them that I would plant. I thought maybe I could do it in such a way that it wouldn't be too destructive to the natural grasses and in that way maybe it wouldn't blow. So they said plant any way you want to because if it is harmful to your land, you could actually be exempt from even doing it.

Q. You planted it every year for five years, '58, '59, '60, '61 and '62?

A. No, after I had talked to Mr. Zundell, I asked him if I should plant any more, and he said it wouldn't make any difference.

Q. You say you did not plant in '62 then?

A. I planted some every year, but I didn't do it in such a way that I was trying to comply with the homestead rules. I thought I was all through with it." (Tr. 68-69; *italics added*.)

In a letter to the land office dated June 28, 1962, appellant similarly explained that: "In 1959, I seeded 20 acres without removing the natural grass (Indian Rice or Bunch Grass) as I was afraid my land would be blown away by the winds. By trying to protect the grass, I was unable to get my seed deep enough to stay alive between rains and for that reason it did not do as well as the year before. In 1960 and 1961, I had to seed in the same manner and the results were about the same."

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provisions, however, are intended to relieve only against ignorance or mistake in a matter of fact, and not of law. 9 Op. Atty. Gen. 511 (1860).

I am unable to find in the record in this case a rational basis for construing the appellant's efforts as substantial compliance with the cultivation requirements of the homestead law. The failure to develop a water supply was not failure to meet a technical requirement of the law. It was, in effect, complete failure to achieve the primary purpose for which the entry was allowed, the agricultural development of the land, and, on the basis alone of failure to comply substantially with the cultivation requirements of the law, the appellant's request for equitable adjudication was properly denied, regardless of the reasons for the noncompliance. Beyond the one year, 1958, appellant did no more than sow seed in a superficial manner which did not mature in a crop. He applied no water to the land in years in which the natural rainfall was clearly deficient (see Tr. 14). These futile efforts or lack of effort occurred in 3 of the 4 years in which cultivation of one-eighth of the entry was required. In the face of these facts, substantial compliance with the cultivation requirements could by no means be found.

It does appear that the appellant's problems may have been aggravated by cloudy advice from land office personnel. However, it is well settled that no rights may be obtained through reliance on erroneous information or advice given by a Bureau employee. See *Fred and Mildred M. Bohen et al.*, 63 I.D. 65 (1956); *Jess H. Nicholas, Jr.*, *supra*, and cases cited. To the extent that any advice given, or action taken, by the land office may have suggested that the appellant would not be required to meet the cultivation requirements of the homestead law because he failed to develop a well or that his noncompliance with those requirements could be excused under principles of equitable adjudication, such advice was in error, for the cultivation requirements of the homestead law are mandatory, and the Department is without authority to waive them. *Jess H. Nicholas, Jr.*, *supra*, and cases cited.<sup>7</sup>

<sup>7</sup> There is nothing in the record to support appellant's apparent assertion at the hearing that he was informed in 1958 or 1959 that he might obtain title to the entered land through equitable adjudication without meeting the cultivation requirements (Tr. 54). The record, including appellant's letter of June 28, 1962, clearly indicates that consideration was not given to this form of relief, and that it was not suggested to appellant that he might obtain a patent without having a well, until after he had relinquished all of his entry except one subdivision and had filed final proof for that one subdivision in 1962, after the statutory life of the entry had expired.

The action of the land office upon receipt of appellant's final proof on May 25, 1962, however, was somewhat nebulous. After initially rejecting the proof for failure to meet the cultivation requirements of the law, as we have noted, the land office vacated its

In view of these findings it is not necessary to determine the extent of the appellant's good faith or the degree to which his failure to develop a water supply may be attributed to circumstances beyond his control.<sup>8</sup> An extensive review of the record is persuasive that the request for equitable adjudication was properly denied and that the entry was properly canceled for the defects shown in the record.

In ruling against the appellant we do not intend to imply that he was attempting to evade the requirements of the law or otherwise act in bad faith. The fact simply is that homesteading on desert land is a harsh proposition, demanding rigorous efforts. That an entryman should fail is not a reflection on him. On the other hand it does not entitle him to the rewards obtainable only for successful compliance with the requirements of the law.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A (4) (a) ; 24 F.R. 1348), the decision appealed from is affirmed without prejudice to the right of the appellant to file application under an appropriate public land law for title to the land in his entry that is occupied by his improvements.

ERNEST F. HOM,  
*Assistant Solicitor.*

decision on July 12, 1962, upon a finding that "the new evidence of cultivation you submitted on June 28, 1962, \* \* \* is deemed to now make your final proof acceptable." In view of the principles outlined above and the appellant's explanation in his letter of June 28, 1962, of the manner in which cultivation was performed from 1959 through 1961, it is difficult to see how that evidence could be found to make his proof acceptable. However, that may be, the decision of July 12, 1962, may properly be construed only as holding that the final proof, as amended by the additional affidavit, showed on its face compliance with the cultivation requirements, whereas initially it had shown noncompliance on its face. There is, of course, a distinct difference between a finding that the final proof showed compliance with the requirements of the law and a finding that the entryman had, in fact, satisfied those requirements.

The subsequent reinstatement of the entire entry on August 3, 1962, is somewhat difficult to understand in view of the recognized deficiencies then appearing of record. Regardless of what may have prompted that action, however, the appellant does not appear to have suffered any injury from the action of the land office except to the extent that he may have been induced to go to the expense of filing final proof for the third time and that he may have been led to an overly optimistic hope that under the principles of equitable adjudication he could be excused for the deficiencies in his proof. As we have pointed out, any such misleading advice appears to have been given after the statutory life of the entry had expired. Thus, it cannot possibly be relied upon to explain any part of appellant's failure to meet the requirements for a patent during the life of the entry.

<sup>8</sup> We do note, however, as the Bureau pointed out, that the land office was informed by the Nevada State Engineer by letter of September 30, 1960, that appellant's application for a permit to appropriate water had been canceled. The record does not disclose that appellant made any further attempt after 1958 to develop a well during the life of the entry, and no explanation is offered for failure to pursue such efforts except a lack of finances (Tr. 53, 54). The Department has consistently held that the inability of an entryman to meet the financial demands for development of his entry is not a circumstance in which he will be found to be without fault. See *Joseph S. Holt, Rose J. Holt*, A-28468 (November 22, 1960) ; *LaDean Butler and Ellen R. Butler*, A-28673 (February 7, 1962) ; *Virgil H. Belisle*, A-29954 (March 24, 1964).

## APPEAL OF COSMO CONSTRUCTION COMPANY

IBCA-468-12-64 *Decided August 3, 1966***Contracts: Construction and Operation: Changed Conditions—Contracts:  
Disputes and Remedies: Equitable Adjustments**

The equitable adjustment contemplated by the Changed Conditions clause incorporated in Standard Form 23A (April 1961 edition) encompasses not only the added costs of overcoming the changed condition itself within the strict physical limits of that condition but includes as well the expense of extra work caused by the changed condition in areas immediately adjacent thereto.

**BOARD OF CONTRACT APPEALS**

On June 28, 1962, the Cosmo Construction Company and the Bureau of Reclamation entered into a contract for the construction of an earthen dam on the Little River and the relocation of a highway near Norman, Oklahoma, the total estimated price being \$3,692,176.80. The provisions of the contract included Standard Form 23A (April 1961 edition), and numerous specifications and general conditions.

In March 1963, the contractor encountered certain subsurface conditions that differed from the conditions indicated by the contract. It is conceded by the Government that the conditions so encountered were "changed conditions" within the meaning of standard Clause 4 of Form 23A.<sup>1</sup> The parties, having failed to agree, after considerable negotiation, upon the amount of the equitable adjustment to be made under that clause, the contractor filed a timely notice of appeal from the decision of the contracting officer. That decision in effect proposed to allow about \$166,000 for the additional expense caused by the changed conditions, as outlined in Order for Changes No. 3 (Part 2). The contractor claims that the actual additional costs so incurred

<sup>1</sup>"The Contractor shall promptly, and before such conditions are disturbed, notify the Contracting Officer in writing of: (a) subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (b) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract. The Contracting Officer shall promptly investigate the conditions, and if he finds that such conditions do so materially differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performance of this contract, an equitable adjustment shall be made and the contract modified in writing accordingly. Any claim of the Contractor for adjustment hereunder shall not be allowed unless he has given notice as above required; or unless the Contracting Officer grants a further period of time before the date of final payment under the contract. If the parties fail to agree upon the adjustment to be made, the dispute shall be determined as provided in Clause 6 of these General Provisions."

amounted to \$1,102,880.41 including 15 percent overhead and profit. The issues presented turn on the question of the extent to which changed conditions may be held to affect the costs of the contractor's work. The Board remanded an earlier appeal concerning this dispute as being premature,<sup>2</sup> and later denied the Government's motion to dismiss in part the present appeal.<sup>3</sup>

The parties entered into a stipulation dated April 21, 1965, identifying questions of fact and simplifying the issues. That stipulation is too lengthy for complete incorporation in this opinion, hence, portions of it will be referred to as they become relevant to a particular aspect of the appeal.

Immediately following a viewing of the site of the project, a hearing was held in Norman, Oklahoma, on May 11 to 14, inclusive, 1965. The contractor (also referred to herein as the appellant) introduced about 43 exhibits (A through QQ). The exhibits produced by the Government at the hearing were numbered 56 through 154 in order to distinguish them from the 55 exhibits forming a part of the appeal file.

The specifications for the earthen dam required that excavation be performed at an early stage along the long axis of the dam to a depth of about 45 feet below the natural ground surface between Stations 21 and 36. The purpose of this excavation was to create a cutoff trench (sometimes referred to as "core trench," and as "COT"). The cutoff trench was backfilled with fine material that formed a relatively impermeable core within the dam, to prevent or at least retard the seepage of water through or beneath the dam after its completion. The designed cutoff trench prism was 35 feet wide at the bottom where it rested on an assumed rock surface at about Elevation 950. Slopes of 2 to 1 were to bring the sides of the trench prism up to natural ground level at about Elevation 995, where the designed width of the trench would be 200 feet. The trench was located so that the point where its downstream slope intersected natural ground was directly below the center line of the crest of the dam. Also, the center line of the bottom of the trench prism was 100 feet upstream measured horizontally from a perpendicular line dropped from the center line of the dam crest down through the point of intersection of the downstream trench slope with the natural ground surface. The impermeable core of fine material, being 200 feet wide in section at ground

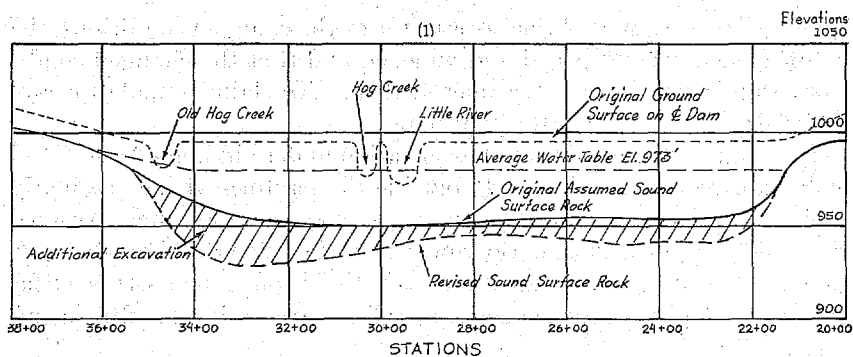
<sup>2</sup> IBCA-412 (February 20, 1964), 71 I.D. 61, 1964 BCA par. 4059.

<sup>3</sup> IBCA-468-12-64 (April 27, 1965), 65-1 BCA par. 4818.

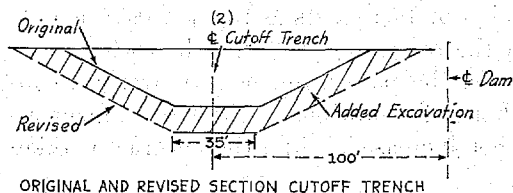
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surface in the trench prism, rose in a tapering form to the crest of the dam where the core ended with a width of about 10 feet. The core prism, including the lower part within the cutoff trench as well as the tapering portion that extended above ground, was entirely upstream from the center line of the crest of the dam, except for about 5 feet at the top. The tracings attached hereto depict the general outlines of (1) the profile of the cutoff trench, as seen from the upstream side, and (2) the profile of the cutoff trench in cross section.

Performance of the contract work began in the latter part of 1962. The preliminary work consisted of stripping the surface soil to a depth that was fairly close to the top level of the water table. When the stripping work had been performed the de-watering subcontractor came on the job and commenced borings for the purpose of locating its well point equipment. About March 25, 1963, the borings showed that the actual top of sound rock was much lower than the assumed level indicated on the plans. The contractor promptly notified the Government by letter of March 28, 1962 concerning the conditions that had been encountered, and requested that the Government make an investigation. The Government soon thereafter analyzed the borings of the de-watering firm and advised the contractor that excavation could proceed in accordance with staking as revised in the field.



PROFILES OF CUTOFF TRENCH



From Exhibit 2 of Appeal File



The work of de-watering was begun under a revised subcontract with a negotiated increase in price amounting to \$78,000 for the first two months and \$555 per day thereafter. The original subcontract price was \$22,680 for the first two months and \$221 per day thereafter. Three stages of well points were used instead of one stage as planned.

The excavation of the cutoff trench continued with successive restakings until a level of sound rock was reached that was satisfactory to the Government. The depth of the actual sound rock line varied from about 8 feet below the elevation indicated by the plans, near the south end of the cutoff trench, to a maximum of about 25 feet below the original assumed rock level, at the lowest elevation of 927 feet, near the north end of the trench. An earth slide occurred during the latter stages of excavation, and this contributed to the difficulties.

After several conferences and repeated requests by the contractor for a determination with respect to the conditions so encountered, the Government in August 1963, issued Part 1 of Change Order No. 3, conceding that changed conditions existed, and providing for the payment to the contractor of the sum of \$110,000 as a tentative settlement to include additional costs of de-watering for the period ending October 1, 1963.

#### *Principal Stipulations*

It has been stipulated that as a result of the changed conditions, the cutoff trench was deepened and widened and that the changed conditions were corrected by December 4, 1963. No claim is made for any added expense incurred after that date.

It was also stipulated that all excavation under bid items 3 and 4 and embankment under bid item 13 outside the paylines of the originally designed cutoff trench as shown in the contract drawings, between Stations 21 and 36, and the Borrow A material under bid items 8 and 9, necessary to produce the embankment in the cutoff trench between Stations 21 and 36 outside the original paylines, are subject to adjustment.

#### *Issues*

It was agreed that a question of fact exists as to whether the costs of performing work within the original cutoff trench, with respect to the bid items referred to in the paragraph next above, were increased as a result of the changed conditions. The Government alleges that those costs were not increased, while the contractor takes the opposite position.

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The Government contends that the changed conditions were confined to the area between Stations 21+00 and 36+00. The contractor maintains that the changed conditions were not so confined, and claims that its expenses of all of the work performed at the site between March 25, 1963 and December 4, 1963, under bid items 1, 3, 4, 5, 8, 9, 10, 11, and 13, together with its claim for idled equipment and correction of the earth slide, should be adjusted.

### *The Dispute over Allowable Costs*

Because of the wide divergence between the respective philosophies of the parties concerning the area of equitable adjustment, it is necessary to examine the rationale of each approach and to determine, if possible, the extent to which either one may be correct. In order to arrive at a logical result, we must analyze the changed conditions clause with respect to its intent concerning the equitable adjustment to be provided.

At the outset, we must reject the appellant's thesis that all of the increases in costs that have a consequential relation to the changed conditions are properly for inclusion in the adjustment pool. On the other side of the coin, we do not hold with the Government's view that the volume of the originally designed prism of the cutoff trench, *ipso facto*, should be excluded from consideration, nor do we adopt the hypothesis that the clause was intended to provide compensation only for the expense of "correcting the changed condition," as that expression has been used to describe what might be better expressed as "coping with," or "overcoming" the changed condition. Even the term "changed condition"<sup>4</sup> is not, strictly speaking, an accurate description of the situations that are contemplated, as was observed by Mr. William Seagle in his excellent article dissecting the wording of the clause.<sup>5</sup>

Moreover, there is a difference between the effects of Clause 4 and the Changes Clause, in so far as they alter the work to be performed by a contractor. Action pursuant to the Changes Clause is initiated by a written order of the contracting officer (we are not now concerned with "constructive" changes). The contracting officer defines the changed work items in an order issued under Clause 3 and the manner and extent of the changes. Hence, the contracting officer exercises

<sup>4</sup> In a current draft of a proposed revision of the clause, the title "Differing Conditions" is used.

<sup>5</sup> Changed Conditions—An Appraisal, 2 Government Contracts Review, 16 July 1958.

control of the aspects that are to be changed. In so doing he limits the quantum of the work that is affected, except where the ordered change causes a conflict with other work, necessitating a further change. The equitable adjustment ordinarily does not go beyond the lines drawn by the contracting officer in the change order. This fact may underlie the doctrine that disallows adjustments for *unchanged* work that may have been delayed or slowed and thus made more costly.

When a changed condition is encountered, it is not because the contracting officer issued an order over which he would have control, although he may of course, issue a change order directing the method to be used in overcoming the condition. The conditions that are found, if they entitle the contractor to an equitable adjustment, take the place of the change order as the dynamic or causative force.<sup>6</sup>

In this case for some time after investigation of the alleged changed conditions the contracting officer did not concede that changed conditions had been encountered. It should be noted that the clause requires nothing of the contracting officer beyond an investigation and ruling with respect to the conditions and, if necessary, an equitable adjustment.<sup>7</sup>

Conversely, the clause itself does not specifically require anything more of the contractor than to give the contracting officer prompt notice of the conditions before they are disturbed.<sup>8</sup> He is already bound to perform the contract, and to continue performance in case of dispute.<sup>9</sup> In this connection it is observed that the Changes clause explicitly states that "nothing provided in this clause shall excuse the contractor from proceeding with the prosecution of the work as changed."

When some of the distinctions between the operation of the Changes Clause and the procedures under the Changed Conditions clause are explored, a certain analogy appears. While a change that is ordered under the changes clause in Standard Form 23A is limited in scope

<sup>6</sup> If the contracting officer finds that the cost of dealing with the changed conditions would be prohibitive, or if performance would be impossible, he may terminate the contract for convenience, or he may negotiate with the contractor to perform the contract at a site not affected by changed conditions. Such actions, however, would be taken pursuant to other clauses or under his basic authority to contract and to terminate. See *United States v. Corliss Steam-Engine Company*, 91 U.S. 321 (1875).

<sup>7</sup> *Morgen & Oswood Construction Co., Inc.*, IBCA-389 (April 21, 1966), 73 I.D. 131, 66-1 BCA par. 552, citing *Shepherd v. United States*, 125 Ct. Cl. 724 (1953).

<sup>8</sup> *Id.*

<sup>9</sup> 6. Disputes:

"(a) \* \* \* Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision."

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by the change order itself and hence, in the usual situation does not produce compensable changes concerning work not changed, it may, as we have noted, generate other legitimate compensable changes by causing unanticipated conflicts or interference. In a similar manner, a changed condition, by its very nature being an accidental or unexpected occurrence, may produce or necessitate changes outside of the strict physical limits of its perimeters.

The Board concludes that the equitable adjustment intended by the Changed Conditions clause is by no means limited in scope to the narrow confines of the area where the changed condition was found to exist. We shall proceed, therefore, to consideration of the several claims, with a view to determining reasonable limitations of eligibility.

*Claim No 1—De-watering—Bid Item No. 1—\$155,284.83*

Bid Item No. 1 of the contract is described as "Diversion and care of river during construction and removal of water from foundations." The lump-sum bid for this work was \$10,000, which obviously was considerably less than the estimated reasonable cost of Item 1 and less than the amount of the subcontract price of de-watering alone (\$22,680 for the first two months of de-watering plus \$221 per day thereafter). The low bid of \$10,000 was explained at the hearing by Mr. Jack H. Taylor, Vice President of Cosmo Construction Company, as being an unbalanced bid resulting from an arbitrary reduction of the total bid price after reduced price quotations were obtained from suppliers of reinforcing cement and pipe (Tr. 37). This reduction was made just prior to formal submission of the Cosmo bid.

The computation of the de-watering claim is set forth below:

Reasonable cost of performing changed work	
(Exhibit K)-----	\$160,449.78
Less: Reasonable cost of performing original design	
(Exhibit H)-----	25,419.50
Additional cost of performing changed work-----	\$135,030.28
Plus 15% for overhead and profit-----	20,254.55
Total claim for additional work of de-watering--	\$155,284.83

The Government has computed the equitable adjustment as amounting to \$39,100.

The Government attacks the de-watering claim as being excessive for the principal reasons that (1) it is based in part upon charges for

pumping time that was not used in de-watering the area in question, and (2) the original subcontract price for this work was unreasonably low when compared with the prices of other bidders ranging from \$150,000 to \$357,000, and the Government's estimate of \$120,000 (Exhibit 59), for the entire work under Item 1. The Government also asserts that the de-watering subcontractor's performance fell short of its agreed obligations, that it failed to remove sufficient water from the excavation, and that appellant failed to enforce the subcontract terms, thus contributing to increased costs of excavation. Moreover, the Government maintains that a two-stage system of well points would have been required if no changed condition had been encountered. The appellant originally planned a one-stage process. Additionally, it is the position of the Government that the revised subcontract was null and void because it had not been approved by the Government as to price (in accordance with its terms), although it had been approved shortly after its execution for the purpose of Davis-Bacon rates. The Government complains that the new subcontract prices were not provided to the Government until September 1963.

Reverting to the first of the defenses raised, the Government has used equipment rental rates and hourly operating rates for the actual time that the de-watering equipment was observed to be in operation in excess of the 60 days originally estimated to be required. This is 73 days, as illustrated by Exhibits 147 and 151 (Sundays, holidays and rainy days are excluded). Using this method, the Government arrived at its proposal of \$39,100 for equitable adjustment of increased de-watering costs (Stipulation, p. 6). The concise reply to this defense is that it is hindsight, and assumes that the work was performed by the contractor's own forces, or that a forward pricing agreement had not been made with its subcontractor. The appellant properly subcontracted the revised work prospectively at firm negotiated prices in accordance with industry practices, after discovery of the changed conditions.<sup>10</sup> Keeping in mind the Government's appraisal of appellant's original estimate as being too low in comparison with bid prices of others for all of the work under Item 1 (before the changed conditions were found), such other bids ranging from \$150,000 to \$357,000, appellant's total cost of \$160,449.78 for de-watering under adverse conditions appears to be reasonable. The periods when the

<sup>10</sup> *Admiral Corporation*, ASBCA No. 8634 (March 24, 1964), 1964 BCA par. 4161; *Ensign-Bickford Co.*, ASBCA No. 6214 (October 31, 1960), 60-2 BCA par. 2317. Cf. *Missile Systems Corp. of Texas, EMTEx Div.*, ASBCA No. 8306 (August 31, 1964), 1964 BCA par. 4434.

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de-watering equipment was not operating in the changed conditions area include necessary down-time for dismantling and moving the equipment while the river was being diverted (Tr. 751-752). The normal contracting practice of the de-watering industry is to charge for all time elapsed from the day the pumping begins until the de-watering is terminated (Tr. 688).

While it is true that appellant's unbalanced bid of \$10,000 for all of the work under Item 1 is unreasonably low, appellant does not rest its claim on that amount. Instead, it utilizes in its calculations the de-watering subcontract price of \$22,680 for the first 60 days plus its contribution of assistance in the estimated amount of \$2,739.50, totaling \$25,419.50. The de-watering work so subcontracted was separate from the other work that was included in Item 1 and there appears to be no evidence concerning the originally estimated cost of such other work (including "diversion and care of river"). The amount of \$25,419.50 seems low, but it is difficult to compare the appellant's original estimated cost of de-watering expense with the bids of other contractors or with the Government's estimate of \$120,000 for the entire quantity of work under Item 1. Lacking a logical and accurate basis for comparison we must conclude that appellant would have been entitled to require its subcontractor to perform the de-watering work for the agreed price of \$22,680 if no changed condition had been encountered. Hence, its original estimate of cost for de-watering was not unreasonably low, although it may have secured a bargain price from the subcontractor, for the first 60 days. Appellant had no assurance, however, that the de-watering period would not extend beyond the 60 days originally contemplated. The possibility that it might take longer than 60 days is attested by the provision in the subcontract for \$221 per day in excess of the first 60 days. In order to arrive at an equitable result that will reflect all of the pertinent factors involved, it is necessary that we examine the remaining objections offered by the Government.

The relative degree of success (or lack of it, in the view of the Government) of the subcontractor's de-watering work, is evidenced to some extent by Government's Exhibits 84-88, 90-100, 102-103, 105, 108-110, 112, 113, 120-122. Exhibits 84-88 are photographs dated April 25 to June 10, 1963, showing pools of water standing in the bottom of the cutoff trench at various locations and successive stages of the excavation process. Exhibit 89 shows, according to the legend on the back of the photograph, the placement of embankment on

June 20, 1963, in the cutoff trench. This material appears to be the fine (Zone 1) material for the core of the dam. No water is to be seen, so it would seem that the occurrences of standing water in shallow pools on June 10, 1963, did not present insurmountable difficulties. Moreover, in very deep excavation, such as was necessary on this project, the problem of drainage to a sump becomes more difficult to solve, with diminishing returns. It may well be that the subcontractor did not do all that conceivably could have been done to eliminate standing water in the bottom of the cutoff trench at all times. It seems to the Board, however, that the Government is advocating a standard of perfection that is seldom achieved in practice in excavation substantially below the water table in a river channel.<sup>11</sup>

One of the Government's arguments, that the revised de-watering subcontract is null and void because it was never approved by the Government concerning price as required by the subcontract provisions, ignores the fact that the subcontract price was given *de facto* approval in Part 1 of Change Order No. 3, by a payment on account of \$110,000 for de-watering up to October 1, 1963, in accordance with the pricing terms of the subcontract.

Whether a two-stage system of well points would have been required in any event, as claimed by the Government, without the intervention of the changed condition, seems to the Board to be a matter of conjecture. This argument is less susceptible of proof than is the point we discussed earlier, i.e., that the contractor had no assurance that the de-watering process would require no more than a 60-day period. Both of these objections have some validity in the sense that they point up the question of reasonable value of the de-watering work under the original bid. Because that value cannot be determined with mathematical precision, the Board will determine what it considers would have been the reasonable value of those services, based on the estimated length of time required for a one-stage system if the changed conditions had not been encountered. This determination takes into account such factors as the high-water table, the relative instability of the soil under conditions of saturation, the uncertainties with respect to the efficiency of well-point systems under varying types of soil strata, and the contingencies with respect to delays due to breakdown of equipment, and down-time for moving the system, that presumably would have had an effect upon the length of time required for the de-watering operations if no changed condition had existed.

<sup>11</sup> See, e.g., *Vinson Construction Company*, IBCA-364 (May 6, 1965), 72 I.D. 193, 65-1 BCA par. 4838.

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These elements are similar in kind (but in a lesser degree) to the factors governing the period required for de-watering under the adversities of the changed conditions. In this connection, the Board has considered Exhibits 130, 131 and 132 (excluded at the time of the hearing) to the extent deemed appropriate in the circumstances, as to this and other claims discussed *infra*.

Accordingly, we have determined that the de-watering operations originally contemplated would have required 90 days rather than 60 days, resulting in an increase of 30 days at \$221 per day, or an increase of \$6,630 in the reasonable value of such services.

At the close of the hearing it was stipulated by the parties (subject to the Board's approval) that the Board should take the following actions:

(1) Render a decision as to whether all or any part of the various items in dispute are subject to adjustment.

(2) Determine the reasonable and necessary costs of accomplishing the work on any of the items held for adjustment necessary to correct the changed condition.

(3) Find the reasonable cost of performing any of the items held for adjustment under (1) above as originally specified.

(4) Remand the matter to the contracting officer for computation of the actual adjustment including application of bid price items previously paid for and amounts allowed under Order for Changes Number 3, Part 2, such computation to be subject to review by the Board if the parties are unable to agree on the computations.

The foregoing meets with the approval of the Board to the extent that it represents only such final mathematical adjustments as may be necessary because of payments previously made pursuant to the contract or its modifications, and not requiring further negotiations. The parties having failed to agree prior to this appeal after protracted negotiations concerning the equitable adjustment, it is intended that, subject to the provisions of law and the rules of the Board, the findings of the Board herein shall be final and conclusive except for such mathematical adjustments, without the necessity of further negotiations, unless such further negotiations are specifically provided for herein.

Additionally, in lieu of making detailed findings with respect to the matters described in the foregoing stipulation, the dollar amounts shown in tabular form herein with respect to the items claimed will constitute the findings of the Board concerning such claims.



Accordingly, the appeal is sustained in part with respect to Claim No. I in accordance with the following computations:

Reasonable cost of performing changed work (Exhibit K)-----	\$160,449.78
Less: Reasonable cost of performing original design (\$25,419.50 from Exhibit H plus \$6,630)-----	32,049.50
<hr/>	
Reasonable additional cost of performing changed work-----	128,400.28
Plus 15% for overhead and profit-----	19,260.04
<hr/>	
Reasonable value of additional de-watering work---	\$147,660.32

*Claim No. II*

*Excavation for Dam Embankment Foundation—Bid Items 3 and 4—  
\$296,990.10*

The contract schedule provided for Bid Items 3 and 4 as set forth below:

Item No.	Work or material	Quantity and unit	Unit price	Amount
	* * *	* *	*	*
3	Excavation for dam embankment foundation, first 312,000 cubic yards.	312,000 cubic yds.	\$0.40	124,800
4	Excavation for dam embankment foundation over 312,000 cubic yards.	168,000	.36	60,480

The excavation work described above consisted of digging the core trench and transporting the excavated material to locations outside of the trench. The quantities shown are estimated except that, as to Item 3, the actual yardage could not exceed 312,000 cubic yards, whereas Item 4 could be more or less than 168,000 cubic yards depending upon actual performance.

The contractor's claim is based on its alleged actual costs of performing all of the work under Items 3 and 4 between March 25, 1963

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and December 4, 1963, less its estimate of the reasonable cost of performance under the original design, as detailed below:

Actual reasonable costs of work under Items 3 and 4 between March 25, 1963 and December 4, 1963 (Exhibit L)-----	\$343, 132. 68
Less: Estimated reasonable cost of performing the work as originally designed (Exhibit T)-----	84, 880. 42
Additional cost due to changed condition-----	\$258, 252. 26
Plus 15% overhead and profit-----	38, 737. 84
Equitable adjustment claimed-----	\$296, 990. 10

The Government has computed the equitable adjustment to be \$127,319.85. Briefly, it is the position of the Government that the work of excavating within the originally designed outlines of the cutoff trench was the obligation of the contractor to perform at the contract price therefor, whether or not there was a changed condition; that the Government is responsible only for the portion of the additional excavation that lay outside and beneath the original design, and then only such part as lay between Stations 21 and 36, representing the ends of the changed condition area. The more shallow portions of the cutoff trench beyond the ends of the changed condition confines were not deepened or widened as a result of the changed condition, except for certain increases in depth and width that were carried out as an independent change, which will be discussed *infra*.

As opposed to the stand taken by the Government, the contractor contends that its cost of excavation were increased not only with respect to the additional excavation required outside of the original cutoff prism, but within that prism as well, also extending to the shallower ends of the trench that were not affected by the changed condition.

Other Government objections to the contractor's method of computing its claim include the rejection of the contractor's total cost approach, and the alleged lack of reasonableness of the contractor's bid estimate of its original cost of performance of the excavation and transportation of excavated materials. That estimate was dependent upon the use of rubber-tired scrapers and "push-cats" for excavating and transporting material from the cutoff trench, except

for the lowest 2 feet of the original design, where it was anticipated that dragline equipment would be needed because of water conditions.

A separate problem is presented with respect to excavation work performed in the cutoff trench between Stations 2+75 and 21, because of a change ordered by the Government in its letter of March 25, 1963 (Exhibit 56). In a letter dated March 29, 1963 (Exhibit 57), the contractor agreed to perform the widening and deepening work involved at the contract unit prices, provided "no water or other subsurface conditions [are] encountered which would make adjustment appropriate under the various contract articles." It appears that this work was done at an early stage of the project but after the changed condition had been discovered; however, it was not necessary that such work be performed at a time when it would add to the difficulty and congestion, for the area involved was not within the limits of the changed condition. Performance of that work was not affected by the changed condition except for transportation of material to embankment, and we consider that aspect to be too remote from the changed condition. It is our opinion that the contractor was bound by its letter of March 29, 1963, and that the Government is entitled to the performance of that work, as well as the placement of embankment, at the contract unit price. Payment on that basis for the yardage involved should be excluded from the equitable adjustment otherwise due the contractor. That yardage of excavation has been shown in Exhibit 137 to be 63,540 cubic yards from Stations 2+37.5 to 21. In view of the difference between Stations 2+37.5 and 2+75, we hereby find that the quantity to be adjusted by payment on the basis of the contract unit price is 63,000 cubic yards.

Aside from the matter of the independent change for which we hold the contractor to its bargain as described above, we are convinced that the work of constructing the entire cutoff trench is of one piece, and that the Government's artificial concept of dividing the work by the imaginary lines of the originally designed prism is not a valid one. It was necessary to perform the work on all sides of those lines with the same equipment at about the same time. We recognize the apparent force of the Government's position with respect to the fact that the contractor would have been obligated in any event to excavate the original prism at the contract unit price. In our opinion, however, the difficulties that attended the work of enlarging and deepening the cutoff trench are inextricably intermingled with the work of excavating the original prism. The Board considers that the contractor has established by a preponderance of the evidence that the work of excavating

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the original prism was made more difficult by the changed condition, for reasons attributable to the wider separation of the well-point systems, steeper ramps, and general loss of efficiency accompanying the congestion of traffic entering and leaving the trench.

The Board rejects the Government's contention that the additional costs engendered by work performed under Items 3 and 4 in areas of the cutoff other than between Stations 21 and 36 are delay claims. The fact is that more difficult work usually takes longer than relatively uncomplicated tasks and this has been recognized by the Board in other instances.<sup>12</sup>

Moreover, consonant with the general conclusions we have reached earlier in this opinion, we find that the effect of the changed condition in this case was not confined to the strict physical limits of the changed conditions itself. We find that the changed condition by its very nature was capable of producing and did produce certain changes and resulting additional expense in adjacent areas, and that such expenses are eligible for inclusion in the equitable adjustment.

The contractor furnished ample evidence concerning its total equipment costs, including ownership rental rates (Exhibit P) and operating costs (Exhibit Q). It is claimed by appellant that the ownership rental rates were in fact agreed upon as a compromise by the parties during negotiations. The Government denies that those rates were binding or that they represent true costs. The Government has conceded, however, the accuracy of the contractor's time records with respect to the equipment hours consumed in performance of the work.

A further objection raised by the Government deals with the fact that the contractor chose to perform certain excavation work in the shallow part of the cutoff trench between Stations 39 and 45, i.e., between the outlet works and the spillway, during the same period that the work in the changed condition area was being performed. The portion in question, being separated from the changed condition area because of the intervening expanse of the outlet works, was not directly affected by the changed condition. It was indirectly affected only as to the transportation element and we consider that to be too remote to have a causal relation, as we have found with respect to the similar situation that existed between Station 2+75 and Station 21. The volume of material excavated has been stated in Exhibit 137 as being 19,692 cubic yards. The quantity involved is hereby excluded from price adjustment and should be paid for at the contract unit prices.

<sup>12</sup> See, e.g., *Lincoln Construction Company*, IBCA-438-5-64 (November 26, 1965), 72 I.D. 492, 65-2 BCA par. 5234.

The Board does not look with favor upon the use of the total cost method of computing an equitable adjustment, for the reason that it is not possible to exclude expenses caused by other factors such as inefficiency, weather, excessive repairs, etc., as contributing causes of the extremely high costs of performance that have been presented here (about four times the original bid estimate). Moreover, the Board is convinced that the rates used by the contractor are overstated to some extent and in our opinion do not reflect the true costs of actual performance. Also, those rates were apparently established without pinpointing the effects of the changed condition with respect to cycling time, distances, turn-around time, etc., as was the case in supporting analyses of the contractor's estimates of its reasonable cost of the original design work. Hence, in order that the Board may arrive at an equitable adjustment, without rejecting the appellant's total cost method in its entirety, it is necessary to take a more conservative approach than would otherwise be followed. Because of the imponderables and unknown factors involved, it is not possible to arrive at a precise mathematical determination concerning the proper quantum of the adjustment of the contractor's claim. It is not required, however, that such a precise calculation be made in the use of the "jury verdict" approach.<sup>13</sup>

Taking into consideration the entire administrative record before us concerning the costs in question, and attempting to resolve fairly the conflicting evidence and the disparate arguments of the parties, the Board has arrived at the conclusion that the claimed actual costs of performing the work under Items 3 and 4 as changed by the changed condition should be reduced from \$343,132.68 to \$260,000.

Additionally, we are not satisfied that the appellant's estimate of the reasonable costs of performing the work under Items 3 and 4 is sufficiently high to cover the contingencies and difficulties that most probably would have been encountered, similar in character to those mentioned in connection with Claim No. II for de-watering.

It is by no means clearly established that the contractor would have been able to construct the original prism on a successful and orderly basis if rubber-tired scrapers and push-cats had been used to a point within 2 feet above the bottom level of the cutoff trench with only a one-stage system of well points. Appellant's expert witness, Mr. Charles C. Pate, testified (Tr. 318) that dragline operations would be necessary within 4 or 5 feet of the hard pan.

<sup>13</sup> *Lincoln Construction Company*, note 12, *supra*, and authorities cited therein.

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The testimony of Mr. Fred C. Walker, a widely recognized expert in the field of earth dams, and head of the Earth Dam Section of the Bureau of Reclamation Regional Office in Denver, indicated that the use of rubber-tired scrapers and push-cats in a saturated soil would be difficult and that the greater part of the excavation below water table would require use of draglines. Similar testimony was offered by Government witnesses Charles R. Maierhofer, head of the Drainage and Groundwater Engineering Branch in the Bureau of Reclamation, and Mr. Arthur Wagner, head of the Physical Properties and Control Section of the Soils Engineering Branch, Bureau of Reclamation.

The original design of the bottom of the cutoff trench was about 25 feet below the water level. In the circumstances, after thorough consideration of the conflicting evidence, the Board concludes that it would have been feasible for the contractor with a one-stage well point system to use scrapers and push-cats to a point between 8 and 12 feet below the water table, and that below that point the contractor would have found it necessary to use draglines for the excavation of the original prism.

As we stated earlier, it is not possible to arrive at the equitable adjustment for items 3 and 4 by precise mathematical calculations. We have arrived at the conclusion, however, developed in part through calculations derived from the de-watering claim, that the reasonable estimated cost of performing the work under items 3 and 4 if no changed condition had intervened should be \$97,000 rather than \$84,880.42.

Accordingly, the appeal is sustained in part as to Claim No. II in accordance with the following computation:

Actual reasonable cost of performing changed work under Items 3 and 4, between Station 21 and Station 36, excluding quantities between Station 2+75 and Station 21 and between Station 39 and Station 45---	\$260,000
Less: Reasonable estimated cost of performing work as originally designed-----	97,000
Additional cost due to changed condition-----	163,000
Plus 15% overhead and profit-----	24,450
Total equitable adjustment-----	\$187,450

*Claim No. III**Earthfill in Dam Embankment—Bid Item No. 13—\$239,330.72*

This claim is related to the backfilling of the excavated cutoff trench with compacted Zone 1 and Zone 2 material from borrow areas, in order to form the inner core of the dam. The claim covers only the work that was required to refill the trench up to original ground level, and is summarized below:

Reasonable actual cost of work between March 25, 1963 and December 4, 1963 (Exhibit BB)-----	\$231,217.49
Less: Estimated reasonable cost of work as origi- nally designed-----	23,103.82
Net amount for adjustment (Exhibit GG)-----	208,133.67
Plus 15% overhead and profit-----	31,217.05
Equitable adjustment claimed-----	\$239,330.72

The Government proposed an equitable adjustment of \$44,144.72. It is the Government's position that just as in the case of Claim No. II, the contractor should be allowed only the contract unit price with respect to the volume or yardage necessary to refill the originally designed prism. For the reasons stated herein concerning the similar issues in Claim No. II, we find that the changed condition impinged upon the work performed in the original prism as well as in the areas outside of the original design. We find that the contractor is entitled to an equitable adjustment upon the same basis, with reduction of the actual costs claimed as described, *infra*, and excluding the quantities involved in the areas between Station 2+75 and Station 21, and between Station 39 and Station 45.

The total costs claimed for this item have received consideration in the same manner as for Claim No. II, and our comments in that regard are applicable here. Similarly, we conclude that the estimated costs of performing the work as originally designed have been somewhat understated (the ratio being about 10 to 1 with respect to claimed actual costs compared with the original bid estimate). Accordingly, the claimed actual costs should be reduced from \$231,217.49 to \$140,000 and the estimated cost of performing the original design

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should be increased from \$23,103.82 to \$60,000 so that the equitable adjustment is recomputed as follows:

Reasonable actual cost of performing changed work under Item 13 between Station 21 and Station 36 excluding quantities between Station 2+75 and Station 21 and between Station 39 and Station 45-----	\$140, 000
Less: Reasonable estimated cost of performing work as originally designed-----	60, 000
<hr/>	
Additional cost due to changed condition-----	80, 000
Plus 15% overhead and profit-----	12, 000
<hr/>	
Total equitable adjustment-----	\$92, 000

#### Claim No. IV

#### *Excavation in Borrow Area "A" and Transportation to Embankment—Items 8 and 9—\$177,639.47*

Items 8 and 9 of the contract are similar to Items 3 and 4, in that they provide for separate quantities of similar material at different unit prices. However, the effect of the changed condition was not similar. We consider that the enlargement of Borrow area "A" and the increased distance of transportation to embankment had little or no effect upon the cost of Items 8 and 9 as originally planned. Also, we find that the causal relation between the changed condition and the cost of the work as applied to Items 8 and 9 with respect to the original prism is too remote for inclusion in the adjustment.

The contractor has used the following amounts in setting up the claim:

Actual costs of work from 3/25/63 to 12/4/63-----	\$230, 884. 20
Less: Reasonable estimated cost as originally designed-----	76, 415. 10
<hr/>	
Balance-----	154, 469. 10
Plus 15%-----	23, 170. 37
<hr/>	
Equitable adjustment claimed-----	\$177, 639. 47

The Government proposed an equitable adjustment of \$85,020. In addition to exclusion of the quantities and costs that have been



asserted concerning the original prism, we find that the actual costs claimed have been overstated as to the work outside the original paylines. We find that the claimed actual costs should be \$93,000 for work applicable to the area outside of the original paylines, excluding work (if any) performed under Items 8 and 9 in those portions of the cutoff trench between Stations 2+75 and 21 as well as between Stations 39 and 45. We find the equitable adjustment to be as follows:

Reasonable actual cost of work under Items 8 and 9 between Station 21 and Station 36 outside of the original paylines excluding work in accordance with the original design and excluding work between Station 2+75 and Station 21 and between Station 39 and Station 45-----	\$93,000
Plus 15% overhead and profit-----	13,950
Total equitable adjustment-----	<u>\$106,950</u>

*Claim No. V*

*Items 10 and 11—Excavation in Borrow Areas "B", "C" and "F" and Transportation to Dam—\$15,091.85*

These items consist of different quantities of Zone 2 material at different unit prices. The contractor's claim is summarized below:

Actual cost as changed-----	\$68,302.89
Less: Estimated cost of original design-----	\$55,179.54
Balance-----	<u>\$13,123.35</u>
Plus 15% overhead and profit-----	1,968.50
Adjustment claimed-----	<u>\$15,091.85</u>

The entire amount was disallowed by the contracting officer. The work involved under Items 10 and 11 was not closely associated with or directly affected by the changed condition, and none of it was carried on within the cutoff trench. Accordingly, any additional expense involved was due to intermediate causes rather than the direct causal relationship that is necessary in our opinion to merit an equitable adjustment.

Accordingly, the appeal is denied in its entirety as to Claim No. V.

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*Claim No. VI*

*Item 5—Excavation for Structures—\$71,616.16*

This claim was denied in its entirety by the contracting officer. Although the claim represents work that was carried on at the same time as the excavation of the cutoff trench, it was performed in a separate area, hence, there was no direct causal relationship with the changed condition. The appeal is denied in its entirety with respect to Claim No. VI.

*Claim No. VII*

*Idle Equipment—\$115,815.32*

The contractor has misconstrued Paragraph 21c of the General Conditions of the contract for idled equipment, which reads in pertinent part as follows:

e. Idle time.—Ownership expense allowance for idle equipment actually employed on the extra work will be made on the basis of 50 percent of the first shift rate for each regular working day, *if the contracting officer determines that the equipment could be used advantageously on other work under the contract and that such use is precluded by impracticability of moving.* (Italics added.)

It does not appear that there was other work under this contract where the idled equipment could have been used. The Board finds that the equipment was idled because of general congestion of traffic on the dam site, and not because it would have been impracticable to move it to a different location on the site if there had been a need for the equipment. Moreover, the contracting officer made no determination in this regard, as required by the clause.

We have held on many other occasions that the Board lacks jurisdiction to pay for the cost of standby or idled equipment in the absence of a "pay-for-delay" or suspension of work type of contract clause.<sup>14</sup>

Accordingly, the appeal is dismissed as to Claim No. VII.

*Claim No. VIII*

*Rehandling of Material—\$10,000*

This claim has been stipulated as being proper for payment and no issue is involved. Hence, it is considered to have been withdrawn and the appeal is dismissed without prejudice as to Claim No. VIII.

<sup>14</sup> *Peter Kiewit Sons' Company, IBCA*—405 (October 21, 1965), 72 I.D. 415, 65-2 BCA par. 5157, and authorities cited therein.

*Claim No. IX**Removing Slide Material—\$21,112.90*

In the stipulation dated April 21, 1965, the Government proposed an adjustment in the amount of \$14,261.64, less a deduction of \$725 for part rental of a mud pump if the entire rental of \$2,083.24 is allowed by the Board under Claim No. I for de-watering. The major difference is due to a surcharge by the contractor of one-third in the amount of the rates charged for the work.

The Board concludes that the amount of \$14,261.64 computed by the Government is fair and reasonable and that the appellant has not sustained its burden of proof as to the propriety of the added charges.<sup>15</sup> The Board did not disallow the rental for the mud pump under Claim No. I, hence it is considered that a deduction is in order.

*Conclusion*

The appeal is sustained in part in accordance with the foregoing opinion. It is denied or dismissed with respect to certain claims or portions thereof as stated in the opinion.

THOMAS M. DURSTON, *Deputy Chairman.*

I CONCUR:

WILLIAM F. MCGRAW, *Member.*

I CONCUR:

DEAN F. RATZMAN, *Chairman.*

**WATER QUALITY STANDARDS—INTERSTATE WATERS WITHIN  
THE MEANING OF SECTION 10(c) FEDERAL WATER POLLUTION  
CONTROL ACT, AS AMENDED—INTERMITTENT AND SMALL IN-  
TERSTATE STREAMS**

Act of June 30, 1948—Act of July 9, 1956—Act of July 20, 1961—Act of  
October 2, 1965

Federal Water Pollution Control Act, as amended, 33 U.S.C. sec. 466 *et seq.*, authorizes the establishing of water quality standards for interstate waters by state authorities, or, in the event of state default, by the Federal Government. However, the act does not require establishment of such standards by either state or Federal authorities.

<sup>15</sup> *American Ligurian Company, Inc.*, IBCA-492-4-65 (January 21, 1966), 66-1 BCA par. 5326.

250] WATER QUALITY STDS.—INTERSTATE WATERS WITHIN 251  
THE MEANING OF SEC. 10(c) FED. WATER POLL. CONTROL ACT, AS  
AMENDED—INTERMITTENT AND SMALL INTERSTATE STREAMS

August 15, 1966

Act of June 30, 1948—Act of July 9, 1956—Act of July 20, 1961—Act of  
October 2, 1965

States are free to select all, or any, portion of interstate water within its jurisdiction for which water quality standards will be established. States may in the exercise of administrative judgment choose not to establish such standards for very small insignificant streams.

Act of June 30, 1948—Act of July 9, 1956—Act of July 20, 1961—Act of  
October 2, 1965

If a stream is "interstate water" within the meaning of the act it is one for which water quality standards may be established under the act, even though such streams may have intermittent flow.

M-36691

August 15, 1966

TO: MR. JOHN T. BARNHILL, ACTING COMMISSIONER, FEDERAL WATER  
POLLUTION CONTROL ADMINISTRATION.

SUBJECT: WATER POLLUTION CONTROL—WATER QUALITY STANDARDS—  
INTERMITTENT AND SMALL INTERSTATE STREAMS.

This is in response to your memorandum of June 13, 1966, in which you inquire:

1. Will water quality standards apply to all interstate streams regardless of size—including those "which are very small and have negligible uses or use potential," and
2. Will these standards apply to interstate streams that have intermittent flow, that is, no flow during dry seasons of the year?

The Federal Water Pollution Control Act (33 U.S.C. sec. 466 *et seq.*), as amended most recently by the Water Quality Act of 1965 (P.L. 89-234) to provide for the establishment of water quality standards, *does not* require the establishment of standards. Section 10(c) of the Act provides that if a state establishes standards which meet the requirements of the Act, those shall be the standards "applicable to such interstate waters or portions thereof." That section further provides that if the state fails to establish standards which meet the requirements of the Act, "the Secretary may" pursuant to the Act establish such standards which shall be applicable to interstate waters.

The establishment of water quality standards under the Act provides the legal basis for enforcement actions directed to abate pollu-

tion which reduces water quality below such standards, and also provides the basic criteria for comprehensive water planning.<sup>1</sup>

The state has the authority under the Act to establish standards for all its interstate waters. However, it need not do so. If the state fails to establish standards for its interstate waters or portions thereof, it has opened the way for the Secretary, who then may, but need not, establish such standards.

The states are free under the Act to choose which portions, if any, of its interstate waters, for which it will establish standards, with the knowledge, however, that insofar as states fail to exercise their standard setting authority under the Act, the Federal Government is free to do so. It is a matter of judgment for each state to select the interstate waters for which it will establish standards. It may well be that where interstate waters are so small and insignificant, the relationship between water quality standards for such streams and the purposes for which standards are to be established under the Act becomes extremely remote and obscure. In the exercise of its administrative judgment, a state might determine not to include such insignificant interstate waters among those for which it will establish standards.

Turning to your question concerning interstate streams with intermittent flow: If a stream is "interstate water" within the meaning of the Act, it is one for which water quality standards may be established. This is not altered by the fact that such stream may have intermittent flow. It seems to us that water quality standards can have a significant beneficial affect on a stream with intermittent flow, just as they can on a stream with constant flow. But, as discussed above, whether standards should be established for any interstate water, is initially a question for a state's administrative determination.

FRANK J. BARRY,  
*Solicitor.*

#### **LOWER COLORADO RIVER BASIN PROJECT — EFFECT OF PROPOSED AMENDMENTS TO H.R. 4671 REQUIRING EXCHANGE OF GILA RIVER WATER FOR MAINSTREAM COLORADO RIVER WATER**

##### **Water and Water Rights: Generally**

A provision in an act of Congress giving the Secretary power to direct an exchange of mainstream Colorado River water for Gila River water with Arizona users and to offer the Gila River water so obtained to New

<sup>1</sup> S. Rep. No. 10, 89th Cong., 1st Sess. 9 (1965)

252] LOWER COLORADO RIVER BASIN PROJECT—EFFECT OF 253  
PROPOSED AMENDMENTS TO H.R. 4671 REQUIRING EXCHANGE OF  
GILA RIVER WATER FOR MAINSTREAM COLORADO RIVER WATER  
*August 19, 1966*

Mexico users would not be in conflict with rights of Arizona and New Mexico as fixed in *Arizona v. California*.

**Water and Water Rights: Generally**

While New Mexico may not divert water from the Gila River in excess of the quantities decreed thereby without violating the *Arizona v. California* Decree, the United States is not restrained by that decree from acquiring and disposing of such water.

**Water and Water Rights: Generally**

The Congress possesses constitutional power to authorize a reclamation project involving the allocation and apportionment of tributary water of the Colorado River as well as of the mainstream of that river.

**Constitutional Law**

While water rights of users of water from the Gila River System constitute "property" of Arizona users protected by the just compensation clause of the Fifth Amendment, this right would be fulfilled by legislative provisions for exchange of Colorado River water for Gila River water as a condition to participation in a federal reclamation project which makes Colorado River water available.

**Water and Water Rights: Generally**

Having lawfully acquired Gila River water, the United States can, at the direction of Congress, dispose of the water, through exchange, as part of a federal reclamation project.

**Constitutional Law**

The Constitution does not prohibit Congress from imposing conditions as a prerequisite to participation in a federal reclamation project.

M-36694

*August 19, 1966*

TO: SECRETARY OF THE INTERIOR.

SUBJECT: LOWER COLORADO RIVER BASIN PROJECT—EFFECT OF PROPOSED AMENDMENTS TO H.R. 4671 REQUIRING EXCHANGE OF GILA RIVER WATER FOR MAINSTREAM COLORADO RIVER WATER.

By letter to you dated June 13, 1966 (copy attached), Representative Morris K. Udall advised that H.R. 4671, which would authorize construction of the Lower Colorado River Basin Project, including the Central Arizona Unit, would also, under a then proposed amendment, direct the Secretary of the Interior to offer to contract with users of Gila River water in New Mexico for water in excess of the

water allocated to such users under Article IV of the Decree of the Supreme Court of the United States in *Arizona v. California*, 376 U.S. 340 (1964).

In that letter Congressman Udall requested our opinion as to whether, under that provision, water users in New Mexico might legally contract with the Secretary for use of water from the Gila River System in quantities in excess of those specified in the Decree in *Arizona v. California*, *supra*, without first obtaining an amendment to that Decree permitting such adjustments to be made. The proposed amendment referred to by Representative Udall has been incorporated into H.R. 4671 as reported by the House Interior Subcommittee on Irrigation and Reclamation to the full Committee on Interior and Insular Affairs and as ordered reported favorably by the full committee.

I have concluded that the Congress has power to direct the Secretary, as provided in the proposed amendment to H.R. 4671, and that the provision is not in conflict with or in violation of the rights adjudicated and fixed by the Supreme Court in *Arizona v. California*, 376 U.S. 340, as between the States of New Mexico and Arizona. Therefore, no amendment to the Decree in *Arizona v. California* need be made to implement the proposed amendment.

#### *Analysis of the Proposed Amendment to H.R. 4671*

In effect, the amendment to relevant provisions of H.R. 4671 would direct an exchange of mainstream Colorado River water by the Secretary of the Interior for certain Gila River water. In turn, the Secretary would be directed to offer to enter into contracts making available to users in New Mexico the Gila River System water he had so acquired by means of the exchange with Arizona users.

Specifically, the Secretary would be first directed, in contracting for the delivery of water to Arizona contract users who presently use water from the Gila River System, to require these users to accept mainstream Colorado River water in exchange for water from the Gila River System in the amount of 18,000 acre-feet per year. The amendment further provides that such exchanges shall be accomplished without economic injury or cost to the affected Arizona contractors and to present users of Gila River water in New Mexico and Arizona.

The 18,000 acre-feet of water made available in this manner from the Gila River System would be required by the amendment to be of-

ferred by the Secretary of the Interior, to water users in New Mexico to permit an additional consumptive use of water in New Mexico not to exceed an annual average of 18,000 acre-feet in any period of ten consecutive years. The net effect would be that New Mexico users would receive from the United States by contract with the Secretary of the Interior 18,000 acre-feet of Gila River System water annually over and above the quantities of Gila River System water apportioned directly to the State of New Mexico by Article IV of the Supreme Court Decree in *Arizona v. California*.

The amendment further provides that an annual average of an additional 30,000 acre-feet of water in any period of ten consecutive years would be made available on the same basis to New Mexico users when and so long as works capable of importing water into the Colorado River System have been completed and there is, as a result, water sufficiently in excess of 2,800,000 acre-feet per annum available from the mainstream of the Colorado River for consumptive use in Arizona to provide water for such additional exchanges.

Existing rights are protected adequately in the language of the amendment.

#### *Apportionment of Gila River System Water*

With respect to the waters of the Gila River System, the Supreme Court, in *Arizona v. California*, 373 U.S. 546 (1963), stated:

\* \* \* the tributaries [including the Gila River in Arizona and New Mexico] are not included in the waters to be divided [in accordance with the Boulder Canyon Project Act] but remain for the exclusive use of each State. 373 U.S. at 567.

The Court, in reaching this conclusion, pointed out that:

\* \* \* only \* \* \* [Arizona] and New Mexico could effectively use the Gila waters, which not only entered the Colorado River too close to Mexico to be of much use to any other State but also was reduced virtually to a trickle in the hot Arizona summers before it could reach the Colorado. 373 U.S. at 573-574.

And finally:

\* \* \* Having determined that tributaries are not within the regulatory provisions of the Project Act the Master held that this interstate dispute [between Arizona and New Mexico] should be decided under the principles of equitable apportionment. 373 U.S. at 595.



The Court went on to accept the terms of a compromise settlement agreed upon by the two States. The terms of this compromise were included in the final Decree issued by the Court. (See Article IV of the Decree, 376 U.S. 340 (1964)). In view of the fact that no exceptions were filed to these recommendations, the Court found it unnecessary to make a judicial determination as to the rights of the two States under the principles of equitable apportionment. The relevant portions of Article IV of the Decree are attached hereto as Exhibit B, p. 263.

The Decree enjoins water users and officials in the State of New Mexico from diverting and using more water from the Gila River System than provided for in the compromise agreement between the States of New Mexico and Arizona. It is clear that, without more, an unauthorized diversion and use of 18,000 additional acre-feet of water from the Gila River System by New Mexico and water users therein would violate the terms and conditions of the Decree.

But here we have under consideration a proposed Congressional direction providing for the acquisition by the United States of Gila River System water now held under the Decree by Arizona users and the disposition of that water by the United States to users in New Mexico. The supplemental water thus provided for would become available to New Mexico users, not under the principles of equitable apportionment referred to by the Supreme Court in *Arizona v. California, supra*, but by a specific Congressional direction and allocation. Under such legislation, the allocation of tributary waters in the Gila River System would become part of the Congressionally authorized comprehensive plan of development of the entire basin. The proposed amendment would provide for the apportionment and allocation, as to the waters in this tributary, in much the same manner as Congress provided for the apportionment and allocation by the Secretary of the Interior of mainstream water of the Colorado River in the Boulder Canyon Project Act.

The allocation and apportionment of tributary water of the Colorado River System and the direction to the Secretary to distribute such water to users in New Mexico and Arizona in accordance with a Congressionally authorized plan is clearly within the broad powers of Congress over the Colorado River. See *Arizona v. California, supra*. In that case, the Court stated that:

\* \* \* Congress still has broad powers over this navigable international stream. Congress can undoubtedly reduce or enlarge the Secretary's power if it wishes. Unless and until it does, we leave in the hands of the Secretary, where Congress

placed it, full power to control, manage, and operate the Government's Colorado River works and to make contracts for the sale and delivery of water on such terms as are not prohibited by the Project Act. (*Italics supplied.*) 373 U.S. at 594.

The power of Congress to authorize this particular reclamation project is not limited to the mainstream or navigable portions of the Colorado River. See *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950) wherein the Court held that:

\* \* \* in conferring power upon Congress to tax "to pay the Debts and provide for the common Defence and general Welfare of the United States," the Constitution delegates a power separate and distinct from those later enumerated, and one not restricted by them, and that Congress has a substantive power to tax and appropriate for the general welfare, limited only by the requirement that it shall be exercised for the common benefit as distinguished from some mere local purpose. \* \* \* Thus the power of Congress to promote the general welfare through large-scale projects for reclamation, irrigation, or other internal improvement, is now as clear and ample as its power to accomplish the same results indirectly through resort to strained interpretation of the power over navigation. 339 U.S. at 738.

In enacting the proposed amendment, Congress would, in effect, extend the authority already vested in the Secretary under the Boulder Canyon Project Act (respecting mainstream Colorado River water) by directing him to secure and dispose of tributary waters of the Gila River System—thus enabling the Secretary to carry out and effectuate the reclamation program and project authorized under the proposed legislation.

The achievement of the objectives of the Federal Reclamation laws by utilization of the principles of exchange is no innovation with the proposed admendment. The principles of exchange of both water and power for the purpose of constructing, operating and maintaining Federal reclamation projects are specifically recognized in section 14 of the Reclamation Project Act of 1939 (53 Stat. 1187, 1197).<sup>1</sup> The

<sup>1</sup> Section 14 of the Reclamation Project Act (Aug. 4, 1939), *supra*, provides, in relevant part, as follows:

\* \* \* \* \*  
The Secretary is further authorized, for the purpose of orderly and economical construction or operation and maintenance of any project, to enter into such contracts for exchange or replacement of water, water rights, or electric energy, or for the adjustment of water rights, as in his judgment are necessary and in the interests of the United States and the project.

proposed amendment would provide a specific directive to the Secretary to apply the principle of exchange with respect to water in the Gila River System to achieve the objectives of the legislation authorizing the lower Colorado River Basin Project.

Concededly, the Gila River System water which the Secretary would acquire under the proposed amendment is "property" of Arizona water users apportioned to them under Article IV of the Decree in *Arizona v. California*. As such, this "property" is protected by the Constitutional guarantee of just compensation under the 5th Amendment of the Constitution. Section 8 of the Reclamation Act of 1902 (32 Stat. 390; 43 U.S.C.A., sec. 383) recognizes the inviolability of such rights by requiring Federal officers to recognize State-created water rights and pay just compensation for them if taken under the power of eminent domain. However, neither section 8 of the Reclamation Act of 1902, *supra*, nor any other relevant statute purports to limit the authority of Federal officers to take such rights under the power of eminent domain so long as the owners are justly compensated therefor. See *City of Fresno v. California*, 372 U.S. 627, 629-30 (1963); *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275 (1958); *Dugan v. Rank*, 372 U.S. 609 (1963); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950). See also *Arizona v. California*, 373 U.S. 546 (1963), and *Turner v. Kings River Conservation District*, 360 F.2d 184 (9th Cir. 1966).

The right of just compensation would be fulfilled in the present situation by the provisions of the amendment for the exchange of mainstream Colorado River water for such Gila River System water. That the affected Arizona users are required to accept 18,000 acre-feet of mainstream Colorado River water in exchange for that quantity of Gila River System water as a condition to their receiving additional supplies of mainstream water by participation in the Central Arizona Unit is in no sense a deprivation of their rights to just compensation.

It is settled beyond question that Congress can condition the participation in the benefits of a Federal reclamation project. See *Ivanhoe Irrigation District v. McCracken*, *supra*; *City of Fresno v. California*, 372 U.S. 627 (1963). The Supreme Court settled this issue in *Ivanhoe* when it stated:

Also beyond challenge is the power of the Federal Government to impose reasonable conditions on the use of federal funds, federal property, and federal privileges. See *Berman v. Parker*, 348 U.S. 26, 99 L. Ed. 27, 75 S. Ct. 98 (1954), and *Federal Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 97 L. Ed. 15, 73 S. Ct. 85 (1952). The lesson of these cases is that the Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof. 357 U.S. at 295.

The United States having lawfully acquired water from the Gila River System, it follows that the United States can, under terms and conditions determined by Congress, dispose of that water as a part of the operation of a Federal reclamation project. See *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Arizona v. California*, 283 U.S. 423 (1931). And see also *Dugan v. Rank*, *supra*; *Ivanhoe Irrigation District v. McCracken*, *supra*; *City of Fresno v. California*, *supra*; and *Turner v. Kings River Conservation District*, *supra*. Nothing in the Constitution would prohibit Congress from imposing such conditions as a prerequisite to participation in the project. In *McCulloch v. State of Maryland*, 17 U.S. (4 Wheat.) 316, 421, 4 L. Ed. 479, 605 (1819), the Court laid down the basic guideline for determining the constitutionality of Congressional action:

\* \* \* Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.

It follows, therefore, that, in so acquiring and disposing of Gila River System water, the United States would not be bound by or transgress upon the terms of Article IV of the Decree in *Arizona v. California*, *supra*, which enjoins and proscribes the diversion or use of quantities of Gila River System water in excess of those specified therein. The injunction set forth therein applies, by its terms, only to the "State of New Mexico, its officers, attorneys, agents and employees." Water users in New Mexico who obtain additional quantities of water under contracts with the United States would not receive such water by reason of the acts or permission of the State of New Mexico or its officers, attorneys, agents or employees. Rather, their rights would derive from the United States in the exercise of its power to acquire and dispose of property in connection with the construction, operation and maintenance of a Federal reclamation project—a power which is entirely outside of and separate from the State action which is the subject of Article IV of the Decree.

I conclude, therefore, as stated at the outset of this memorandum, that should the legislation, if enacted, include the amendment enclosed with Congressman Udall's letter of June 13, 1966, users in New Mexico may, to the extent therein provided, legally contract with the Secretary for the use of Gila River System water in quantities in excess of the uses specified in the Decree in *Arizona v. California*, *supra*, without first obtaining an amendment to that Decree.

FRANK J. BARRY,  
Solicitor.

CONGRESS OF THE UNITED STATES  
HOUSE OF REPRESENTATIVES

Washington, D.C. 20515

June 13, 1966

Honorable Stewart L. Udall  
Secretary of the Interior  
Washington, D.C. 20240

Dear Mr. Secretary:

The Committee on Interior and Insular Affairs has under consideration a bill entitled, H.R. 4671, which will authorize the construction and operation of a dam on the upper reaches of the Gila River in New Mexico as a part of the central Arizona unit of the project.

The bill will also authorize the Secretary to contract with users of Gila River water in New Mexico for water in excess of that permissible under Article IV of the decree of the Supreme Court of the United States in *Arizona v. California*. A copy of the bill and the proposed language is attached.

I would like to have an opinion from your Solicitor as to whether the users in New Mexico may legally contract with the Secretary for use and actually use Gila System water in quantities in excess of the uses specified in the decree in *Arizona v. California*, without first obtaining an amendment to that decree by virtue of the language of H.R. 4671 as enclosed.

Sincerely,

MORRIS K. UDALL.

Page 34 and 35: Strike entire Section 304 (Section 303 of Committee Print No. 19) and insert new section as follows:

SEC. 304. (a) The central Arizona unit shall consist of the following principal works, (1) a system of main conduits and canals, including a main canal and pumping plants (Granite Reef aqueduct and pumping plants) for diverting and carrying water from Lake Havasu to Orme Dam or suitable alternative, which system shall have a capacity of 2,500 cubic feet per second (A) unless the Definite Plan Report of the Bureau of Reclamation shows that additional capacity (i) will provide an improved benefit to cost ratio, and (ii) will enhance the ability of the central Arizona unit to divert water from the mainstream to which Arizona is entitled and (B) unless the Secretary finds that additional cost

PROPOSED AMENDMENTS TO H.R. 4671 REQUIRING EXCHANGE OF  
GILA RIVER WATER FOR MAINSTREAM COLORADO RIVER WATER

August 19, 1966

resulting from such additional capacity can be financed by funds from sources other than the funds credited to the development fund pursuant to Sec. 403(c) of this Act and without charge, directly or indirectly, to water users or power customers in the States of California and Nevada; (2) Orme Dam and Reservoir and power pumping plant or suitable alternative; (3) Buttes Dam and Reservoir, which shall be so operated as to not prejudice the rights of any user in and to the waters of the Gila River as those rights are set forth in the decree entered by the United States District Court for the District of Arizona on June 29, 1935, in *United States v. Gila Valley Irrigation District et al.* (Globe Equity No. 59); (4) Hooker Dam and Reservoir, which shall be constructed to an initial capacity of ninety-eight thousand acre-feet and in such a manner as to permit subsequent enlargement of the structure (to give effect to the provisions of Sec. 304 (c) and (d)); (5) Charleston Dam and Reservoir; (6) Tucson aqueducts and pumping plants; (7) Salt-Gila aqueduct; (8) canals, regulating facilities, powerplants, and electrical transmission facilities; (9) related water distribution and drainage works; and (10) appurtenant works.

(b) Unless and until otherwise provided by Congress, water from the natural drainage area of the Colorado River system, diverted from the main stream below Lee Ferry for the central Arizona unit, shall not be made available directly or indirectly for the irrigation of lands not having a recent irrigation history as determined by the Secretary, except in the case of Indian lands, national wildlife refuges, and, with the approval of the Secretary, State-administered wildlife management areas. It shall be a condition of each contract under which such water is provided under the central Arizona unit that, (1) there be in effect measures, adequate in the judgment of the Secretary, to control expansion of irrigation from aquifers affected by irrigation in the contract service area; (2) the canals and distribution systems through which water is conveyed after its delivery by the United States to the contractors shall be provided and maintained with linings, adequate in his judgment to prevent excessive conveyance losses; (3) neither the contractor nor the Secretary shall pump or permit others to pump groundwater from lands located within the exterior boundaries of any federal reclamation project or irrigation district receiving water from the central Arizona unit for any use outside such federal reclamation project or irrigation district, unless the Secretary and the agency or organization operating and maintaining such federal reclamation project or irrigation district shall agree or shall have previously agreed that a surplus of groundwater exists and that drainage is or was required; and (4) all agricultural, municipal and industrial waste water, return flow, seepage, sewage effluent and groundwater located in or flowing from contractor's service area originating or resulting from (i) waters contracted for from the central Arizona unit or (ii) waters stored or developed by any federal reclamation project are reserved for the use and benefit of the United States as a source of supply for the service area of the central Arizona unit or for the service area of the federal reclamation project, as the case may be: *Provided*, that notwithstanding the provisions of item (3) above, the agricultural, municipal and industrial waste water, return flow, seepage, sewage

effluent and groundwater in or from any such federal reclamation project, may also be pumped or diverted for use and delivery by the United States elsewhere in the service area of the central Arizona unit, if not needed for use or re-use in such federal reclamation project.

(c) The Secretary may require as a condition in any contract under which water is provided from the central Arizona unit that the contractor agree to accept mainstream water in exchange for or in replacement of existing supplies from sources other than the mainstream. The Secretary shall so require in contracts with such contractors in Arizona who also use water from the Gila River system, to the extent necessary to make available to users of water from the Gila River system in New Mexico additional quantities of water as provided in and under the conditions specified in subparagraph (d) of this section; *Provided that* such exchanges and replacements shall be accomplished without economic injury or cost to such Arizona contractors.

In times of shortage or reduction of mainstream water for the central Arizona unit (if such shortages or reductions should occur), contractors which have yielded water from other sources in exchange for mainstream water supplied by that unit shall have a first priority to receive mainstream water, as against other contractors supplied by that unit which have not so yielded water from other sources, but only in quantities adequate to replace the water so yielded.

(d) In the operation of the central Arizona unit, the Secretary shall offer to contract with water users in New Mexico for water from the Gila River, its tributaries and underground water sources, in amounts that will permit consumptive use of water in New Mexico not to exceed an annual average in any period of ten consecutive years of eighteen thousand acre-feet, including reservoir evaporation, over and above the consumptive uses provided for by Article IV of the decree of the Supreme Court of the United States in *Arizona v. California* (376 U.S. 340). Such increased consumptive uses shall not begin until and shall continue only so long as delivery of Colorado River water to downstream Gila River users in Arizona is being accomplished in accordance with this Act in quantities sufficient to replace any diminution of their supply resulting from such diversions from the Gila River, its tributaries and underground water sources. In determining the amount required for this purpose full consideration shall be given to any differences in the quality of the waters involved.

The Secretary shall further offer to contract with water users in New Mexico for water from the Gila River, its tributaries and underground water sources in amounts that will permit consumptive uses of water in New Mexico not to exceed an annual average in any period of ten consecutive years of an additional thirty thousand acre-feet, including reservoir evaporation. Such further increases in consumptive use shall not begin until and shall continue only so long as works capable of importing water into the Colorado River system have been completed and water sufficiently in excess of two million eight hundred thousand acre-feet per annum is available from the mainstream of the Colorado River for consumptive use in Arizona to provide water for the exchanges herein authorized and provided. In determining the amount required for this purpose full consideration shall be given to any differences in the quality of the waters involved.

All additional consumptive uses provided for in this Section 304(d) shall be subject to all rights in New Mexico and Arizona as established by the decree entered by the United States District Court for the District of Arizona on

June 29, 1935, in *United States v. Gila Valley Irrigation District et al.* (Globe Equity No. 59) and to all other rights existing on the effective date of this Act in New Mexico and Arizona to water from the Gila River, its tributaries and underground water sources, and shall be junior thereto and shall be made only to the extent possible without economic injury or cost to the holders of such rights.

## EXHIBIT B

### ARTICLE IV OF THE DECREE IN ARIZONA v. CALIFORNIA

The State of New Mexico, its officers, attorneys, agents and employees, be and they are after four years from the date of this decree hereby severally enjoined:

\* \* \* \* \*

(C) From diverting or permitting the diversion of water from the Gila River, its tributaries (exclusive of the San Francisco River and San Simon Creek and their tributaries) and underground water sources for the irrigation within each of the following areas of more than the following number of acres during any one year:

Upper Gila Area.....	287
Cliff-Gila and Buckhorn-Duck Creek Area.....	5,314
Red Rock Area.....	1,456

and from exceeding a total consumptive use of such water (exclusive of uses in Virden Valley, New Mexico), for whatever purpose, of 136,620 acre-feet during any period of ten consecutive years; and from exceeding a total consumptive use of water (exclusive of uses in Virden Valley, New Mexico), for whatever purpose, of 15,895 acre-feet during any one year;

(D) From diverting or permitting the diversion of water from the Gila River and its underground water sources in the Virden Valley, New Mexico, except for use on lands determined to have the right to the use of such water by the decree entered by the United States District Court for the District of Arizona on June 29, 1935, in *United States v. Gila Valley Irrigation District et al.* (Globe Equity No. 59) herein referred to as the Gila Decree), and except pursuant to and in accordance with the terms and provisions of the Gila Decree; provided, however, that:

(1) This decree shall not enjoin the use of underground water on any of the following lands:



(Specific description of excepted lands) or on lands or for other uses in the Virden Valley to which such use may be transferred or substituted on retirement from irrigation of any of said specifically described lands, up to a maximum total consumptive use of such water of 838.2 acre-feet per annum, unless and until such uses are adjudged by a court of competent jurisdiction to be an infringement or impairment of rights confirmed by the Gila Decree; and

(2) This decree shall not prohibit domestic use of water from the Gila River and its underground water sources on lands with rights confirmed by the Gila Decree, or on farmsteads located adjacent to said lands, or in the Virden Townsite, up to a total consumptive use of 265 acre-feet per annum in addition to the uses confirmed by the Gila Decree, unless and until such use is adjudged by a court of competent jurisdiction to be an infringement or impairment of rights confirmed by the Gila Decree;

(E) Provided, however, that nothing in this Article IV shall be construed to affect rights as between individual water uses in the State of New Mexico; nor shall anything in this Article be construed to affect possible superior rights of the United States asserted on behalf of National Forests, Parks, Memorials, Monuments and lands administered by the Bureau of Land Management; and provided further that in addition to the diversions authorized herein the United States has the right to divert water from the mainstream of the Gila and San Francisco Rivers in quantities reasonably necessary to fulfill the purposes of the Gila National Forest with priority dates as of the date of withdrawal for forest purposes of each area of the forest within which the water is used.

August 18, 1966

Frank J. Barry, Esquire  
Solicitor  
Department of Interior  
Washington, D.C. 20240

Dear Mr. Barry:

This is in response to your letter of August 11, 1966, transmitting a draft Solicitor's Opinion dated August 9, 1966 and requesting my review of the conclusion reached therein that the Decree in *Arizona v. California*, 376 U.S. 340, need not be amended to permit contracts between users in New Mexico and the Secretary of the Interior for use of Gila River System water made pursuant to Congressman Udall's amendment to H.R. 4671, also transmitted.

Based upon your analysis in the Opinion of the operation of the amendment and the manner in which the contract authority would be exercised, including the statement that no permission from the State of New Mexico, its officers, attorneys, agents or employees would be involved, I concur in your conclusion that H.R. 4671, as amended, does not require the amendment of Article IV of the Decree in *Arizona v. California*.

Sincerely,

THURGOOD MARSHALL,

*Solicitor General.*

August 11, 1966

Honorable Thurgood Marshall  
*Solicitor General*  
Department of Justice  
Washington, D.C.

Dear Mr. Marshall:

Representative Morris K. Udall of Arizona has transmitted to the Secretary the text of an amendment to the pending Colorado River legislation, H.R. 4671, which has been adopted by the House Committee on Interior and Insular Affairs.

Representative Udall requests our opinion on whether, in the event the legislation becomes law with the amendment, users in New Mexico may legally contract with the Secretary of the Interior for and actually use Gila system water in quantities in excess of the uses specified in the Decree in *Arizona v. California* without first obtaining an amendment to that Decree.

I have analyzed the question raised by Representative Udall, and am of the view expressed in the enclosed proposed opinion that the contracts provided for could be entered into and the water provided and used thereunder without an amendment of the Decree. However, by reason of the fact that the question involves an interpretation of the Decree, I have thought it desirable to request your review before coming to a final conclusion.

Members of my staff and I are, of course, available for consultation, and we shall be pleased to render any assistance you may desire.

Sincerely yours,

FRANK J. BARRY,  
*Solicitor.*

**APPEALS OF AMERICAN CEMENT CORPORATION****IBCA-496-5-65****IBCA-578-7-66***Decided September 21, 1966*

**Contracts: Construction and Operation: Estimated Quantities—Contracts: Disputes and Remedies: Jurisdiction—Contracts: Performance or Default: Breach**

The Board has jurisdiction of a contractor's claim for quantities of cement delivered in excess of the aggregate estimated requirements for cement for the Glen Canyon Dam and Power Plant, irrespective of whether the contract is a requirements contract and without regard to whether the interpretation of the contract involves the determination of questions of fact, mixed questions of law and fact or questions of law only.

**Contracts: Disputes and Remedies: Jurisdiction—Contracts: Construction and Operation: Changes and Extras—Contracts: Performance or Default: Acceleration**

A contractor's characterization of a claim for unnecessary accelerated construction costs of a cement producing plant as a claim for breach of contract will not preclude the Board from scheduling a hearing on the claim where the contracting officer expressly states that the contractor must be relying upon some order from him to accelerate construction and more facts are required for resolution of the jurisdictional question presented.

**Contracts: Disputes and Remedies: Jurisdiction—Contracts: Performance or Default: Breach—Rules of Practice: Appeals: Dismissal**

Under a contract for the delivery of cement for the Glen Canyon Dam and Power Plant, a contractor's claim for loss of commercial business or lost profits, attributed to the Government's failure to order cement in accordance with the estimated requirements set forth in the contract, will be dismissed as without the jurisdiction of the Board where neither the extras clause nor any other contract clause provides a remedy for the alleged wrong.

**BOARD OF CONTRACT APPEALS**

The contractor in an appeal from Findings of Fact of May 18, 1966, has requested a preliminary determination of the jurisdiction of the Board over two of its claims arising from a contract to supply cement needed by the Government in construction of the Glen Canyon Dam. As to this the contractor states: "The purported findings and decision of the Contracting Officer with respect to these claims should be vacated and the Board of Contract Appeals should summarily determine that the Board, as well as the Contracting Officer, has no jurisdiction to consider them for the reason that neither claim could be

September 21, 1966

remedied under the contract." Alternatively, the contractor has requested the Board "summarily to vacate the findings and decision of the Contracting Officer for the reason that these proceedings have been undertaken in bad faith and in an arbitrary manner."

Both parties have requested a hearing on the issues presented but the contractor's request has been conditioned upon the proceedings not being summarily dismissed. For its part, the Government has requested a hearing not only on the issues embraced within the contracting officer's findings of fact of May 18, 1966 (IBCA-578-7-66), but also those involved in an earlier appeal (IBCA-496-5-65) still pending before the Board. The Government has also moved for consolidation of the two appeals for the purposes of hearing and decision. In view of these several motions the Board concludes that it should now determine, if possible, the jurisdictional questions presented by both appeals.

### *Background*

Before proceeding further, it would seem advisable to briefly summarize the unusual course that these appeals have followed. On July 6, 1965, the contractor filed Petition No. 215-65 in the Court of Claims<sup>1</sup> seeking recovery against the United States in the aggregate sum of \$3,677,488.88 by reason of the Government having failed to order cement in accordance with a schedule of estimated requirements set forth in the contract. The petition set forth five claims<sup>2</sup> briefly described as follows:

1. Cost of Idle Capacity-----	\$1, 508, 824. 88
2. Loss From Delay In Payments-----	288, 296. 00
3. Amounts Not Heretofore Paid On Barrels In Excess of 3,000,000-----	104, 352. 00
4. Unnecessary Accelerated Construction Costs--	830, 316. 00
5. Loss of Commercial Business-----	945, 700. 00
 Total-----	 \$3, 677, 488. 88

<sup>1</sup> The petition states " \* \* \* The plaintiff seeks to recover from the United States the sum of \$3,677,488.88 representing damages incurred as a result of the negligence of and/or the delay in orders by the United States in connection with Invitation No. DS-5023 and Contract No. 14-06-D-2838, and cement supplied to the United States in excess of that provided for in said Invitation and Contract, together with interest thereon as provided by law."

<sup>2</sup> The sequence in which the claims are listed corresponds to the order in which the several claims were considered by the contracting officer in Findings of Fact of March 19, 1965 (IBCA-496-5-65), and May 18, 1966 (IBCA-578-7-66). Numbers have been added to facilitate reference to the claims in the text of the opinion.

In the Petition as initially filed, Claims 1, 2, 4 and 5 were grounded upon Paragraph A-5 of the contract, "Suspension of Deliveries," or, alternatively, if that clause was found not to apply, upon a breach of contract. Claim 3 was grounded upon Paragraph A-2, "Extras," or, alternatively, if that clause was found not to apply, upon a breach of contract. Subsequently, however, the contractor amended Paragraphs 7 and 8 of the Petition to say that there is no contractual provision applicable to the several claims and that in all cases a breach of contract occurred which is compensable outside the terms of the contract.

Of the claims included in the Court of Claims action, the first three were presented to the contracting officer in the contractor's letter of December 29, 1964. In Findings of Fact of March 19, 1965, the contracting officer found that Claims 1 and 2 were "claims for damages which the contracting officer has no authority to consider or settle." As to the third claim the contracting officer found that "the requirement for delivery of and payment for cement in excess of 3,000,000 barrels was in accordance with the terms of the contract \* \* \*." The contractor appealed this finding but only in so far as it pertained to deliveries of cement to the Government in excess of 3,000,000 barrels. Following the filing of the Petition in the Court of Claims, the Government moved, *inter alia*, to stay proceedings before the Board in order that Claims 4 and 5 could be considered by the contracting officer and later consolidated with the claim previously submitted to the Board under IBCA-496-5-65. In our decision of January 6, 1966,<sup>3</sup> we denied the Government's motion. Meanwhile, the contracting officer had written the contractor to advise that he considered the claim for acceleration costs and the claim for loss of commercial business to be "claims that are properly for administrative consideration." In the same letter,<sup>4</sup> the contracting officer invited the contractor to submit further detailed evidence relating to the claims for his consideration but stated that if it failed to do so findings and a decision would be issued based solely on the evidence available. Subsequently, by letter of January 10, 1966, the contractor furnished detailed information in support of the claims in question. Thereafter, the contracting officer issued the Findings of Fact of May 18, 1966, denying both claims. In the appeal therefrom the contractor raised two of the jurisdictional questions with which we are now concerned.

<sup>3</sup> IBCA-496-5-65 (January 6, 1966), 65-2 BCA par. 5303.

<sup>4</sup> Letter of November 3, 1965.

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The contractor has not appealed the contracting officer's finding<sup>5</sup> that Claims 1 and 2 are without his jurisdiction. In the absence of an appeal from the contracting officer's findings respecting these claims,<sup>6</sup> the Board concludes that these claims are not presently before us.

As to Claim 3, however, the contractor vigorously contests the contracting officer's finding that barrels of cement in excess of 3,000,000 "were ordered under the provisions of the contract, and were paid for as provided in the contract." This finding unquestionably stems from the contracting officer's view of the contract as a "requirements" contract.<sup>7</sup> This is opposed to the contractor's view<sup>8</sup> that the Government was contractually obligated to order cement in accordance with the schedule of estimated quantities set forth in Paragraph B-10 "Deliveries"<sup>9</sup> of the contract and that in no event was the Government entitled to receive deliveries in excess of 3,000,000 barrels, nor was it entitled to any in 1964 at the specified contract price.<sup>10</sup>

<sup>5</sup> Findings of Fact of March 19, 1965.

<sup>6</sup> The failure to appeal the contracting officer's determination respecting these claims was not inadvertent, as is evident from the Notice of Appeal of April 26, 1965, in which the following statement appears: "\* \* \* The contractor agrees with the contracting officer that the claims for (1) cost of idle capacity and (2) loss from delay in payment are claims for damages for breach of contract which the contracting officer has no authority to consider or settle \* \* \*"

<sup>7</sup> This is well illustrated by paragraph 4 of the findings in which the contracting officer states: "This paragraph [Paragraph B-1, 'The Requirements'] makes it very clear that the requirement for 3,000,000 barrels of cement is estimated, and goes on to provide that if the contractor is able to provide it, *all cement* for Glen Canyon Dam and Powerplant will be ordered under this contract. The paragraph also provides for a maximum required delivery rate of 120,000 barrels per month, if the contractor cannot furnish cement in excess of 120,000 barrels per month. Actually the 120,000 barrel rate was exceeded during March 1962 when 122,653 barrels were furnished. Paragraph B-1 also provides that the contract covers the cement needed for the Dam and Powerplant up until December 31, 1964."

<sup>8</sup> The Notice of Appeal succinctly states the contractor's view: "Deliveries of cement in excess of 3,000,000 barrels of cement are not within the purview of Paragraph B-1. The Requirement of Invitation DS-5023 (set forth in Finding 4 of the contracting officer's decision). While Paragraph B-1 provides that the Government may 'require in excess of 120,000 barrels of cement per month' it does not provide that such excess monthly requirements can exceed the overall contract quantity of 3,000,000 barrels. The contractor's claim is based on the fact that the Government required more barrels than the agreed 3,000,000, not on the fact that the Government required more than 120,000 in any particular month."

<sup>9</sup> The estimated requirements set forth in Paragraph B-10 appear below:

Year	Estimated requirements, barrels	Maximum requirements, barrels
1959-----	150,000	300,000
1960-----	960,000	1,440,000
1961-----	960,000	1,440,000
1962-----	900,000	1,300,000
1963-----	30,000	100,000

<sup>10</sup> This is clear when the comments in the Notice of Appeal respecting Paragraph B-1,

The inclusion of the claim for cement furnished in excess of 3,000,000 barrels in the Petition filed with the Court of Claims while the matter was still pending before the Board indicates that the contractor may be questioning our jurisdiction over this claim. This is not inconsistent with the position taken by the contractor in the various documents filed with the Board in support of the appeal. In the Notice of Appeal itself the contractor not only stated that it was reserving the right to present the matter to the Court of Claims but argued that the contracting officer, as an alternative to granting the relief sought, should have found that he was "without authority to interpret the terms and scope of the contract with reference to the excess barrels of cement as such determinations involve questions of law." Despite these misgivings, the contractor contended that either the cement so delivered was payable as an extra within the contemplation of Paragraph A-2, Extras of the contract or it was entirely outside the contract.<sup>11</sup>

The contractor has not addressed itself to the anomalies involved in making our jurisdiction depend upon granting relief; nor will we since the question of the application of the Extras clause to the claim will not even be reached if the Board concludes that the contract is, in fact, a "requirements" contract.<sup>12</sup> On the other hand, if the Board were to conclude that the contract is not a "requirements" contract, the equitable adjustment in price, if any, to which the contractor would be entitled would involve the determination of a question of fact.<sup>13</sup> Similarly, if the contract provisions were determined to be

note 8, *supra*, are read in conjunction with the comments relating to Paragraph B-10, quoted below:

"Deliveries of cement in excess of 3,000,000 barrels, are not within the purview of Paragraph B-10. Deliveries \* \* \* as that paragraph concerns only deliveries which were to be made in the years 1959 through 1963, inclusive, and deliveries of cement not to exceed 3,000,000 barrels. Here the contractor's claim is for payment for cement both in excess of 3,000,000 barrels and delivered in 1964."

<sup>11</sup> Page 10 of Brief in Support of Appeal.

<sup>12</sup> The Armed Services Board of Contract Appeals has assumed jurisdiction in a number of cases involving the question of what constitutes a requirements contract, e.g., *D. F. Fischer & Sons Ltd.*, ASBCA No. 7916, 1963 BCA Par. 3702; *Metro Industrial Painting Corp.*, ASBCA No. 6328, 1962 BCA par. 3343; and *Teague Brothers Transfer & Storage Co., Inc.*, ASBCA No. 4419, 59-2 BCA par. 2337. The assumption of jurisdiction in such cases appears to be merely a particular application of the rule that boards have authority to determine what performance is called for by the terms of the contract, *Framlau Corp.*, IBCA-228 (November 1, 1961), 68 I.D. 324, 61-2 BCA par. 3198; *Southern Athletic Co., Inc.*, ASBCA No. 10674, August 17, 1966, 66-2 BCA par. 5777 citing *Prestes, Inc.*, ASBCA No. 6572, 61-1 BCA par. 2937, as well as to determine the amount of payment to which a contractor is entitled thereunder (*Houston-Fearless Corp.*, ASBCA No. 9160, 1964 BCA par. 4159).

<sup>13</sup> *United States v. Callahan Walker Construction Company*, 317 U.S. 56 (1942).

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ambiguous and the ascertainment of the intent of the parties to the contract became the paramount issue, the determination of the question of their intent would entail the resolution of a question of fact.<sup>14</sup> But the authorities make clear that most questions of interpretation involve mixed questions of law and fact.<sup>15</sup> The Board would not be without jurisdiction in the circumstances of this case, however, even if a pure question of law were found to be involved,<sup>16</sup> since this would only affect the finality of the administrative decision and the nature of the judicial review.<sup>17</sup> We find, therefore, that the Board has jurisdiction to hear and determine all issues involved in Claim No. 3.

### IBCA-578-7-66

In asserting jurisdiction over Claim 4 (Unnecessary Accelerated Construction Costs) and over Claim 5 (Loss of Commercial Business), the contracting officer makes clear that he is proceeding on the assumption that he is not precluded from exercising jurisdiction by the contractor's characterization of these claims as for breach of contract, if, in fact, they are cognizable under the contract.<sup>18</sup> This Board<sup>19</sup> and other boards<sup>20</sup> have expressed similar views as to the nature of their jurisdiction.

For a claim to be cognizable under the contract, however, it must be shown that there is a contract provision under which relief of the type sought could be granted. Absent such a showing, there is nothing to which the jurisdiction of either the contracting officer or the Board can attach.<sup>21</sup> The contracting officer apparently recognizes that this is so, for in the findings he undertakes to show that Claims

<sup>14</sup> *Lowell O. West Lumber Sales v. United States*, 270 F. 2d 12 (9th Cir. 1959).

<sup>15</sup> 9 *Wigmore on Evidence*, sec. 2556 (3d ed.); and 3 *Corbin on Contracts*, sec. 554 (1960 ed.). See also *Morrison-Knudsen Company v. United States* (Ct. Cl. 1965), 345 F. 2d 833.

<sup>16</sup> *Robert J. Gordon Construction Company*, IBCA-216 (April 21, 1960), 60-1 BCA par 2594.

<sup>17</sup> *Blake Construction Co., Inc.* (Dec. 2, 1964), SBCA No. 1289G 65-1 BCA par. 4557.

<sup>18</sup> Paragraph 6 of Findings of May 18, 1966.

<sup>19</sup> E.g., *Henly Construction Company*, IBCA-249 (December 7, 1961), 68 I.D. 348, 61-2 BCA par. 3240 ("Within the factual scope of an appeal, the Board is not limited either by the appellant's own choice of remedy nor by the Government's assignment of defense.").

<sup>20</sup> See, for example, *San Antonio Construction Co., Inc.*, ASBCA No. 8110, 1964 BCA par. 4479 in which the Board stated: "But the characterization of a claim as one for damages for breach of contract has no impact on our jurisdiction to resolve it when there is a contract clause under which it may be considered. \* \* \*."

<sup>21</sup> *Morrison-Knudsen Company v. United States*, note 15, *supra*. *Peter Kiewit Sons' Co.*, IBCA-405 (March 13, 1964), 1964 BCA par. 4141 ("The Board's power to grant relief must be found within the 'four corners' of the contract \* \* \*").



4 and 5 are cognizable under the Changes<sup>22</sup> and the Extras Clause, respectively. Our inquiry will be directed to determining whether he has been successful in either or both of these efforts.

### *The Acceleration Claim*

Claim No. 4 is for what the contractor has termed "Unnecessary Accelerated Construction Costs" and is in the amount of \$830,316. The claim is not for acceleration of deliveries under the contract but rather is for acceleration costs allegedly incurred in an effort to be in readiness to deliver cement by the time the Government had the right to place orders. It is the appellant's position that the Government's failure to order any cement in 1959 (the earliest of the five years listed in Paragraph B-10), constituted a breach of its contract and thereby rendered it liable to the appellant for the extra costs incurred in accelerating construction of its plant in order to be in readiness to make deliveries in 1959.

Many of the contracting officer's findings are related to the merits of the contractor's claim (e.g., whether it did in fact accelerate and, if so, to what extent) and consequently, are not germane to the jurisdictional question with which we are concerned. It is apparent, however, that the contracting officer considers that the appellant is relying upon some action by him as constituting a constructive order to accelerate the building of its plant. Thus, in paragraph 59 of the findings he states: "American Cement has cited no order of the contracting officer issued to it upon which it relies as a directive to accelerate construction of its plant. No pertinent facts in this regard are furnished in Counsel's letter of January 10, 1966 (Exhibit 4). From the information presented in the petition before the Court of Claims, it must be assumed that reliance is placed upon some alleged act or failure to act on the part of the contracting officer as amounting to a constructive order to accelerate the building of its plant. \* \* \*."

<sup>22</sup> The contracting officer does not specifically refer to the Changes clause in this connection but it is evident that he is relying upon the doctrine of constructive change as the basis for the jurisdiction asserted. Illustrative is paragraph 4 of the findings in which he states: "\* \* \* it is well established that Government contracting officers do have authority to accelerate performance of contracts, and to make adjustment for extra costs incident thereto, and thus a claim for acceleration, whether, in the view of the contractor, necessary or unnecessary, presents a claim arising under the contract. Such a claim involves factual issues concerning the matter of whether there was, in fact, acceleration; what orders or actions of the contracting officer are pertinent to a consideration of the acceleration claims \* \* \*."

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According to the appellant's view, Claim 4 is a claim based upon Government delay for which no remedy is provided by the terms of the contract.

Resolution of the question presented is not materially assisted by an examination of the record. The findings acknowledge, however, that there was a strike in the contractor's plant from June 1, 1959 to July 28, 1959.<sup>23</sup> The appellant's reply to the Government's statement of position makes clear that the appellant is not contending that the Government advanced the performance date of the contract and that its claim "has nothing whatsoever to do with an acceleration of the performance time specified in the contract." Still unanswered, however, is the question of whether with knowledge of the strike, the contracting officer insisted that the contractor adhere to the performance time specified in the contract, and thereby increased its costs over what they would have been if the contractor's right to an appropriate extension in the time for performance of the contract had been recognized.

In the claim for unnecessary accelerated construction costs the contractor unquestionably is charging that the Government's actions caused it to proceed in an uneconomical manner. Relief has been provided under the contract for a number of claims of this nature. Apart from the strike, this may or may not be a case in which such relief may be granted. From the record now before us it is not possible to say. Additional evidence brought out at a hearing may shed additional light on the entire matter. Primarily we need to know more facts in order to answer the jurisdictional question presented.

Accordingly, the appellant's request for a summary determination that the contracting officer and also the Board are without jurisdiction over Claim 4 is denied without prejudice to the appellant's right to renew the motion after a hearing on the claim.

#### *Loss of Commercial Business*

The basis for Claim No. 5 is stated in the Petition filed in the Court of Claims on July 6, 1965.<sup>24</sup> Taking exception to the contracting

<sup>23</sup> Paragraph 68 of Findings of Fact of May 18, 1966.

<sup>24</sup> Paragraph 10(c) captioned "Loss of Commercial Business" makes the following allegations: "During 1962 Plaintiff's share of the Arizona commercial market amounted to 32.2 percent, during 1963 it was 36.3 percent, and during 1964 it was 38.9 percent. A conservative estimate of plaintiff's market potential for these years is 35 percent, 39 percent and 42.5 percent, respectively. Plaintiff suffered a loss of 112,000 barrels in 1962, 115,000 barrels in 1963, and 159,000 barrels in 1964, or a total loss in commercial business of 386,000 barrels for the above period. During the period in question the commercial price f.o.b. Clarkdale plant was \$3.45 per barrel and the marginal cost required to manufacture and market was \$1.00 per barrel, or a loss to plaintiff of \$2.45 per barrel. Therefore, plaintiff has been damaged in the additional amount of \$945,700."

officer's assertion of jurisdiction over this claim, the appellant states: "The second claim that the Contracting Officer has erroneously assumed to be subject to his jurisdiction is one for lost profits. The contractor claims that during the period it provided cement to the government it was unable to sell cement to many members of the general public. The result of this was to damage the contractor in an amount equal to the profits that would have been derived from such sales. Again, the contract between the contractor and the government fails to provide a remedy for a claim of this nature."<sup>25</sup>

The contracting officer's assumption of jurisdiction over the claim is predicated upon the view that the ordering of cement in excess of the amount provided for in the contract would constitute Extras under Clause No. 3 of the General Provisions of the contract.<sup>26</sup> The contracting officer explains both his assertion of jurisdiction and his denial of the claim largely in terms of this clause.<sup>27</sup> The contracting officer makes no reference whatsoever, however, to Clause A-2 "Extras" of the Special Conditions.<sup>28</sup> From even a cursory examination, however, it is apparent that the two clauses are complementary to one another. Clause A-2 delineates the scope of the clause and prescribes the basis of reimbursement for extras provided to the Government under the contract. Clause 3 is a terse *caveat* in a standard form.

We are unable to conclude that either of these clauses has any bearing on the claim as presented. According to its terms Clause A-2 only becomes operative when at the request of the contracting officer,

<sup>25</sup> Notice of Appeal, pp. 2, 3.

<sup>26</sup> "3. Extras. Except as otherwise provided in this contract, no payment for extras shall be made unless such extras and the price therefor have been authorized in writing by the Contracting Officer."

<sup>27</sup> Assumption of jurisdiction and denial of the claim is also based upon the view that the contract in question was a "requirements" contract and that even if the contract were viewed as an "estimated quantities" contract, rather than a "requirements" contract, the variations were well within the range of what would be regarded as normal. (E.g., see paragraphs 87 and 88 of Findings of Fact.)

<sup>28</sup> "A. 2 Extras. The contractor shall, when ordered in writing by the contracting officer, perform extra work and furnish extra material, not required by the invitation or included in the schedule, but forming an inseparable part of the work contracted for. Extra work and material will ordinarily be paid for at the lump sum or unit price stated in the order. Whenever, in the judgment of the contracting officer, it is impracticable, because of the nature of the work or for any other reason to otherwise fix the price in the order, the extra work and material shall be paid for at the actual necessary cost as determined by the contracting officer, plus an allowance, not to exceed 15 percent of such actual necessary cost of the extra work and materials, for superintendence, general expense, and profit. The actual necessary cost will include all reasonable expenditures for material, labor (including compensation insurance and social security taxes), and supplies furnished by the contractor, and a reasonable allowance for the use of his plant and equipment, where required, but will in no case include any allowance for office expenses, general superintendence, or other general expenses."

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the contractor has performed extra work and furnished extra material as an inseparable part of the work contracted for.<sup>29</sup> Such clause has no application to the claim under consideration. The Brief in Support of Appeal states with respect to Claim 5: " \* \* \* The Contractor's claim in this connection is not to be compensated for the extra cement sold to the government, but for damages that the Contractor incurred because it was incapable of selling cement to various members of the general public. By selling extra cement to the government the Contractor had to forego sales to others, and thereby lost the profits that would have been derived from such sales."<sup>30</sup>

The provisions of the clause outlining the basis of reimbursement for the extras supplied to the Government when the price is not stated in the order are likewise wholly inapplicable to the claim as presented. The provision for payment to the contractor of the "actual necessary cost" for the extra work performed and the extra material furnished by it and the provision enumerating the elements to be included in the term "actual necessary cost" are wholly without meaning where, as here, the appellant seeks to recover the profit included in amounts that assertedly would have been paid by other customers.

The Government has attempted to draw on analogy between the circumstances involved in the present appeal and the fact that in presenting Claim No. 3 the contractor relied upon Clause A-2, "Extras," as an alternative basis for relief. In the Government's Statement of Position the question is posed: "Is it reasonable to assume that appellant relied upon the "Extras" Clause *only* for excess quantities over 3,000,000 barrels, but *not* for excess quantities over the annual estimates stated in the contract?"<sup>31</sup> The two situations are readily distinguishable, however, in that the claim for excess quantities over 3,000,000 barrels represent cement delivered to the Government, while the claim for loss of commercial business or lost profits does not represent cement delivered to anybody.<sup>32</sup>

<sup>29</sup> The 386,000 barrels of cement on which the claim for lost profits is based do not represent extra work performed for or extra material furnished to the Government. For this cement there were no recorded sales and there were no recorded costs. The 386,000 figure is simply the contractor's estimate of the amount of additional commercial business it could have obtained during 1962, 1963, and 1964, but for the Government's action in ordering cement in excess of the estimated requirements set forth in the contract (Note 24, *supra*).

<sup>30</sup> Appellant's Brief, p. 3.

<sup>31</sup> Statement of Position, pages 17 and 18.

<sup>32</sup> This is apparent from the appellant's statement as to the basis for the claim. It also is borne out by the fact that there is no correspondence between the barrels of cement

The Government objects to accepting the contractor's characterization of the claim as a claim for lost profits.<sup>33</sup> It cites cases to show that a contractor's characterization of his claim as for breach of contract is not determinative of the jurisdiction of the Board. This is very true but it does not alter the fact that neither the contracting officer nor the Board have any authority to act in the resolution of a dispute unless a contract provision gives them such authority.<sup>34</sup> The reason that neither the contracting officer nor the Board has jurisdiction over this claim is that the Extras Clauses of the contract, to which we have been referred as the basis for our jurisdiction, have been found to be inapplicable and no other clause in the contract purports to provide relief for the type of claim asserted by the contractor.<sup>35</sup> This is not to say that a contractor's characterization of its claim as for breach of contract or as a claim arising under the contract is entirely

delivered in excess of the estimated requirements for a particular year and the number of barrels of cement on which the claim for lost profits for that year is based. According to appellant's claim letter of December 29, 1964, shipments of cement in the years 1961, 1962, and 1963 exceeded the estimated requirements for those years by 173,722, 243,664, and 366,171 barrels, respectively. The contractor makes no claim for lost profits in 1961, however, and the claims for 1962 and 1963 involve 112,000 and 115,000 barrels, respectively. According to the Findings of Fact (Exhibit 20), the contractor shipped only 20,957.56 barrels to the Government in 1964, but it is claiming lost profits for that year on 158,000 barrels.

<sup>33</sup> The contractor has consistently so characterized the claim. In the initial claim letter of December 29, 1964, the contractor makes reference to a claim in a then undetermined amount for the "losses sustained by American Cement Corporation resulting from its inability to supply commercial accounts." In both the Petition and the Amended Petition in the Court of Claims the contractor describes the claim in Paragraph 10(c) as being for the "Loss of Commercial Business." The contractor's letter of January 10, 1966 (Exhibit 4 to the Finding of Fact) refers to the claim in the same terms. In the Notice of Appeal the contractor identifies the claim as "one for lost profits." In the Brief in Support of Appeal the contractor refers to the claim as "one for loss of commercial business profits" while in the Reply to Statement of Position the contractor states that the claim is "for lost profits."

<sup>34</sup> See *Morrison-Knudsen Company v. United States*, note 15, *supra*. ("Where relief is available to the contractor under a provision of the contract (or phrased alternatively where the dispute is within the jurisdiction of the administrative board), we deem it unwise to base the right to a trial *de novo* on the fact-law dichotomy \* \* \*"). See also *Simmel-Industrie Meccaniche Societa Per Azioni*, ABSCA No. 6141 (January 24, 1964), 61-1 BCA par. 2917. ("Although, the characterization of a claim as one for damages for breach of contract has no impact upon our jurisdiction to resolve it when there is present a contract clause under which it may be considered, we have repeatedly held that absent a specific provision in the contract authorizing contract price adjustment for the act complained of, no relief may be granted by this Board.")

<sup>35</sup> In the Petition filed in the Court of Claims under date of July 6, 1965, the contractor relied upon Paragraph A-5, "Suspension of Deliveries" of the Special Conditions as an alternative basis for relief but the Petition as later amended deleted all references to the clause. In any event, it is clear that the clause applies only to suspension of deliveries occurring after orders have been placed pursuant to Paragraph B-10 and, consequently, is wholly irrelevant to the circumstances of this case.

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without significance. It is a material factor and is to be considered in determining our jurisdiction.<sup>36</sup>

The Government also relies on the fact that, according to its view, the instant contract is a requirements contract and, consequently, the failure of the Government to order cement in the quantities and at the times estimated in the contract could not have constituted a breach of contract by the Government.<sup>37</sup> But whether the contract is or is not a requirements contract would not appear to have any direct relationship to our jurisdiction. If the contract were unquestionably not a requirements contract and if the quantity of cement ordered unquestionably exceeded any normal variation permissible thereunder, we still would have no authority to compensate the contractor for a claim for loss of commercial business or lost profits by way of an equitable adjustment in the contract price under the Extras clause or any other standard contract clause with which we are familiar. This is so because the adjustments allowable under such clauses do not extend to claims for loss of commercial business allegedly attributable to Government action. In the absence of such coverage, both the contracting officer and the Board are without authority to redress the alleged wrong.

It is recognized, of course, that a finding on the requirements contract question<sup>38</sup> may have a direct bearing on the question of whether Claims 1, 2, 4 and 5 are meritorious. Since this is so, a question might arise as to whether jurisdiction over this claim should not be retained at least through the hearing stage in order to provide a complete administrative record.<sup>39</sup> In the circumstances with which we are confronted, however, there is no possibility in any event of providing a complete administrative record for all claims in which there may exist common questions of fact. As previously noted the contracting of-

<sup>36</sup> See *Morgen & Oswood Construction Co., Inc.*, IBCA-389 (November 21, 1963), 70 I.D. 495, 1963 BCA par. 3945, where in denying the Government's motion to dismiss the appeal, the Board stated: "Nor is there merit to the suggestion that a breach of an implied condition of reasonability is involved. This suggestion is evidently based upon *R. P. Shea Company*, IBCA-37 (November 30, 1955), 62 I.D. 456, 6 CCF par. 61,738, which involved a situation where the contractor was regarded as having put itself outside the Board's jurisdiction by conceding that its claim was not based upon the only article in the contract under which relief could have been afforded by us. Here, no such concession has been made."

<sup>37</sup> Statement of Position, pages 12 and 13.

<sup>38</sup> Such a finding will be required to resolve the issues presented in Claim No. 3 which we have found to be properly before us.

<sup>39</sup> See *United States v. Carlo Bianchi & Company, Inc.*, 373 U.S. 709 (1963).

ficer has specifically found that Claims 1 and 2 are claims over which he has no jurisdiction. These claims are not presently before us but rather are pending disposition in the Court of Claims. The question of whether the instant contract is or is not a requirements contract clearly has no greater relevance to Claims 4 and 5 than it has to Claims 1 and 2. We conclude, therefore, that setting Claim No. 5 for hearing on the basis of the considerations that we have mentioned would serve no useful purpose.

Recently the Board said that it would dismiss an appeal where it is clearly established that it is grounded on breach of contract or where the contract contains no provision under which the relief sought by the appellant could be provided.<sup>40</sup> The Board stated: “\* \* \* That situation exists in this appeal. Finally, the recent decision of the Supreme Court in *United States v. Utah Construction and Mining Co.* has disposed of the possibility that it is necessary for Boards to take jurisdiction of an appeal for the purpose of making findings of fact with respect to ‘pure’ breach of contract claim.”<sup>41</sup>

The Board finds that the contract contains no provision under which the relief sought by appellant in Claim No. 5 could be provided. Accordingly, the appellant’s request that the Board determine that the contracting officer and also the Board are without jurisdiction in the matter is granted. The appeal, in so far as it relates to Claim No. 5, is dismissed.

### *Improper Conduct of the Parties*

As an alternative basis for the relief sought the appellant has requested the Board “summarily to vacate the findings and decision of the Contracting Officer for the reason that these proceedings have been undertaken in bad faith and in an arbitrary manner.” After reviewing some of the chronological history of the several claims the Notice of Appeal continues: “In short, these proceedings represent a cynical attempt to abuse the administrative procedures contemplated under a government contract and are designed exclusively for the pur-

<sup>40</sup> *Christy Corporation*, IBCA-461-10-64 and IBCA-569-5-66 (June 20, 1966), 66-1 BCA par. 5630.

<sup>41</sup> The following excerpt from the Utah case, 384 U.S. 394 (June 6, 1966), is quoted in a supporting footnote: “Thus the settled construction of the disputes clause excludes breach of contract claims from its coverage, whether for purposes of granting relief or for purposes of making binding findings of fact that would be reviewable under Wunderlich Act standards rather than de novo.”

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pose of harming the contractor in another forum.”<sup>42</sup> The Government has countered by making substantially similar charges against the appellant.<sup>43</sup>

Essentially what both the appellant and the Government are charging is that in taking various actions the other party was improperly motivated. Careful perusal of the record discloses very little in the way of clear support for the charges of either party. We can confirm, as charged by the appellant, that the contracting officer issued a “forty-eight page single spaced, typewritten document,” together with accompanying exhibits,<sup>44</sup> as his Findings of Fact and Decision.

Ordinarily, the length of a Findings of Fact is related to the complexity of the issues involved in the appeal. As to the Findings of Fact in question, it is at least noteworthy that some eighteen pages are devoted to answering charges raised by the appellant (in earlier correspondence and in the Petition filed in the Court of Claims) concerning actions of the Government under another contract with a different contractor for the construction of Glen Canyon Dam and Power Plant. If the appellant deemed it proper to inject these matters into the proceedings in order to properly present its case, there would appear to be no legitimate basis for objection to the contracting officer’s attempt to show the factual and legal setting of the actions complained of. Considering that the contracting officer was addressing himself to the merits of the claims, as well as to the jurisdictional questions raised by the appellant, we are unable to conclude that the findings were of an inordinate length or that they contained material extraneous to the issues as viewed by the contracting officer.

In the appellant’s view the contracting officer’s insistence that Claims 4 and 5 were subject to his jurisdiction is grossly inconsistent

<sup>42</sup> The forum is the Court of Claims, as the Notice of Appeal makes clear (“the Contracting Officer’s two-sided assumption of jurisdiction, his sudden change of mind and his elaborate findings that weave in and out of all of the contractor’s claims in the Court of Claims proceedings create no mystery whatsoever, provided that it is clearly understood that these proceedings are simply a heavy-handed attempt to prejudice the contractor before the Court of Claims \* \* \*”).

<sup>43</sup> The Statement of Position after taking note of the appellant’s accusations continues: “\* \* \* In response to this the Government charges that the *contractor’s acts*, from the submission of its letter of December 29, 1964, through to the present time, represent the ‘cynical attempt to abuse the administrative procedures contemplated under’ the present contract. The contract provides for administrative resolution of disputes *when they occur* during the term of the contract, and yet *contractor said absolutely nothing until the present contract was completed!* At that point contractor engaged counsel and framed a letter presenting a ‘monumental’ claim to the contracting officer. \* \* \*”).

<sup>44</sup> Termed “monumental” by the appellant.



with his earlier determination that Claims 1 and 2 were not. This may or may not be true but as the Department Counsel has demonstrated it would not be difficult on this record to show that the contractor has sometimes pursued courses of action which appear to be somewhat inconsistent. To examine possible inconsistent actions of either party would appear to serve no useful purpose.<sup>45</sup> As far as we know, mere inconsistency has never been equated with culpability; nor do we consider that there is any necessary relationship. Accordingly, the appellant's request that the contracting officer's findings and decision be summarily vacated on the grounds hereinbefore stated is denied.

*Summary*

In IBCA-578-7-66 the appellant's motion to dismiss the appeal is denied as to Claim No. 4 and granted as to Claim No. 5. The Government's motion for consolidating the appeal in IBCA-496-5-65 with the appeal in IBCA-578-7-66 for the purpose of hearing and decision is granted in so far as the remaining claim (Claim No. 4) is concerned. The hearing on both appeals shall be confined to the question of liability. Each appeal shall continue to carry its presently assigned docket number.

The hearing requested in IBCA-496-5-65 and IBCA-578-7-66 will be held in Denver, Colorado, in late October or in November 1966. The Board will issue a formal notice concerning the hearing in the near future.

WILLIAM F. MCGRAW, *Member.*

I CONCUR:

I CONCUR:

DEAN F. RATZMAN,  
*Chairman.*

THOMAS M. DURSTON,  
*Deputy Chairman.*

BURT A. WACKERLI ET AL.

A-30576

*Decided September 27, 1966*

Secretary of the Interior—Surveys of Public Lands: Generally—Surveys of Public Lands: Authority to Make

The Secretary of the Interior is authorized, and is under a duty, to consider and determine what lands are public lands, what public lands have been

<sup>45</sup> Inconsistent conduct is frequently considered, of course, in resolving questions of intent of the parties at a particular time. Our remarks are not to be construed as indicating that we will not take into account the conduct of the parties in deciding the case on the merits, if such conduct is germane to the issues presented.

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or should be surveyed, and what public lands have been or remain to be disposed of by the United States, and he has the authority to extend or correct the surveys of public lands as may be necessary, including the surveying of lands omitted from earlier surveys.

### **Public Lands: Riparian Rights—Surveys of Public Lands: Generally**

Generally meander lines are not to be treated as boundaries, and when the United States conveys a tract of land which is shown by the official plat of survey to border on a navigable river the purchaser takes title up to the water line, but where it is shown that the meander line shown on the plat did not approximate the course of the meandered river and that substantial areas of land remained unsurveyed because of error on the part of the surveyor, the purchaser may be limited in his conveyance to those lands lying outside the meander line, as shown on the official plat of survey, and lands lying between the original meander line and the bank of the river may be surveyed as public lands of the United States.

### **Rules of Practice: Hearings**

A hearing need not be held to determine the propriety of a survey of lands as public lands of the United States where the protestants against such survey fail to support their protest with evidence or the proffer of evidence tending to show error in the supposed facts relied upon by the Bureau of Land Management as the basis for the survey.

### **APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Burt A. Wackerli and others<sup>1</sup> have appealed to the Secretary of the Interior from a decision dated December 9, 1965, whereby the Chief, Division of Engineering, Bureau of Land Management, dismissed their protest against the survey of certain lands in secs. 12 and 13, T. 2 N., R. 37 E., Boise Mer., Idaho, which purportedly were omitted from the original survey of that township approved on February 5, 1878.<sup>2</sup>

<sup>1</sup> The named protestants (appellants) are:

Burt A. and Lueva G. Wackerli, M. R. and Hazel R. Skelton, Harold and Rina Southwick, D. F. Maurer, Walter and Donna N. Struhs, Charles R. and Virginia Jachetta, First Security Bank of Idaho, Construction Finance Company, Bert and Irene Rowe, Albert W. and Ennid S. Breiter, Norman G. and Dolores Jones, First Federal Savings and Loan Association of Idaho Falls, Western Life Insurance Company, Utah Mortgage Loan Corporation, A. R. Henderson, Alton C. and Irene B. Kartchner, Bankers Trust Company, Frank Keefer, Robert and Mary T. Embleton, B & B Building Co., Inc., Melvin L. and Phyllis E. Smith, and the State of Idaho, Department of Highways.

<sup>2</sup> The decision contained no provision for an appeal, but it allowed the protestants to submit a protest directly to the Secretary against the official filing of the survey plats at any time prior to ten days before the date set for official filing. The present appeal was styled an "appeal from rejection of protest" and a "protest to the decision of the Bureau of Land Management." In practical effect, it is an appeal to the Secretary from a decision of the Bureau of Land Management, and it is so treated here.

The records shows that in April 1961 the Bureau of Land Management ordered an investigation and a conditional survey of lands purportedly omitted from prior surveys of Ts. 1, 2, 3, 4 and 5 N., R. 37 E., Boise Mer., Idaho. The purpose of the investigation and survey was to determine whether there are areas of land between the original meanders of the Snake River which are actually islands, separated from the mainland by channels of the river, and which existed as land above the ordinary high-water mark of the river on July 3, 1890, when Idaho was admitted to the Union, and whether there are other areas of land between the original meanders which were omitted from the original surveys "by reason of gross, erroneous location or by fraud."

Pursuant to these instructions an investigation was conducted which resulted, *inter alia*, in a determination that there were lands omitted from the original survey of T. 2 N., R. 37 E., and in the execution of surveys of such omitted lands.

On September 22, 1965, appellants filed a protest in the Idaho land office against the "proposed re-survey and plat of the east side of the Snake River of lands located in the South  $\frac{1}{2}$  of the Southeast Quarter of Section 12 and the Northeast Quarter of Section 13, Township 2 North, Range 37 East." On December 9, 1965, plats of survey describing 187.94 acres of land omitted from previous surveys in secs. 12, 13, 24, 25 and 35, T. 2 N., R. 37 E., were accepted on behalf of the Director, Bureau of Land Management, and the appellants' protest was dismissed on the same date by the Chief, Division of Engineering.

On December 30, 1965, notice of acceptance of the survey plats and of the proposed official filing of the plats in the Idaho land office was published in the Federal Register (30 F.R. 16273),<sup>3</sup> and on January 4, 1966, appellants filed their present appeal.<sup>4</sup>

It appears that all of the appellants claim title to land derived from William Damme, to whom patent was issued on April 19, 1888, for the E $\frac{1}{2}$ SE $\frac{1}{4}$  and lot 4, sec. 12, and lots 1, 2 and 3, sec. 13, T. 2 N., R. 37 E. The numbered lots conveyed to the patentee, which, according to the

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<sup>3</sup> The published notice of acceptance of the survey plats initially set the date for official filing of the plats in the land office for January 25, 1966. However, that notice was subsequently modified, and the proposed date of filing was changed to February 10, 1966 (31 F.R. 300, January 11, 1966), and the filing was thereafter suspended until further notice (31 F.R. 2503, February 8, 1966).

<sup>4</sup> Subsequent to the filing of the present appeal, Vernon Logan submitted a letter to the Department on March 9, 1966, commenting on the re-survey. It is not clear whether Logan is protesting against the survey of the omitted lands or against the protest against the survey.

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official plat of survey approved February 5, 1878, bordered on the Snake River on the west, contained, according to that plat, an aggregate of 89.52 acres. According to the plats of survey approved December 9, 1965, there is an area of land opposite the above-mentioned lots lying between the east meander line of the Snake River, as shown by the 1878 survey plat, and the actual east bank of the river, as established by the 1965 survey, and containing an aggregate of 49.90 acres.

The appellants contended in their initial protest to the land office that the meander line along the east side of the Snake River, as shown by the 1878 plat, while it did not follow the exact sinuosities and variances of the stream, closely approximated them, that at the time of the survey, prior to any upstream improvements in the way of dams and reservoirs and filling along the meander line, the level of the river overflowed portions of presently used lands between the meander line and the present stream course, that at the time of the survey the amount of land lying above the stream level and the surveyed meander line was of minor extent when compared with the patented area, that at the present time there are fewer than 25 acres of land between the level of the river and the meander line, including considerable fill of low lying lands along the river, that all of such lands passed to the patentee at the time of the patent and cannot be considered omitted lands, and that any accretion or reliction that may have taken place has occurred since the date of the patent and belongs to the patentee and his grantees.

In dismissing the protest, the Chief, Division of Engineering, found that the areas of the newly surveyed lands are not insignificant when considered in relationship to the areas of adjoining patented subdivisions, that there are 79.95 acres of omitted land fronting on 114.04 acres of adjoining land in section 12, which omission is equal to 70 percent of the patented land, and that there are 29.68 acres of omitted land in section 13, which is equal to 43 percent of the 68.40 acres of adjoining patented backlands. He further found that the omitted lands average in elevation some 20 feet above the surface of the Snake River and are about the same elevation as other lands fronting the river in Idaho Falls, that any artificial fill appears to have been confined to the road grade along the river in section 13, and that there

is no evidence that the course of the river has changed from its present location by erosion or accretion since the original survey. These factual conditions, he stated, obviate any suggestion that at the time of the original survey this stretch of the river was correctly meandered, even within a liberal construction that a meander line need not reflect minute sinuosities of the river bank. He concluded that, whatever the reason for the surveyor's action in delineating the course of the river, his failure to include relatively large bodies of upland in his survey resulted in constructive fraud against the Government and that the fact that the surveyor did not correctly meander the river brings this case within the exception to the general rule that the true boundary of a tract of land bounded by a meander line is the mean high-water line.

The appellants repeat here the same contentions which they made before the land office. In addition, they contend that the Chief, Division of Engineering, erred in rejecting their initial protest "in that he has considered the incorrect facts as to how you measure whether there is excessive land between any particular patented area and the mean high-water mark of the river." They assert that:

\* \* \* The Idaho law is clearly established that the mean high water mark is that point, not where the water averages its height [sic] during the year, but that wherein there is flooding for sufficient length of time to prevent the normal growth of vegetation and to show on the ground the normal washing of flooding. The amount of omitted land cannot be measured by entire areas, as is done in the letter rejecting the protest, nor does the letter take into consideration where the actual mean high water mark was, prior to the change and reliction which has occurred in the stream since the date of survey.

Appellants also allege that at the time of the original survey the level of the river overflowed portions of the presently used lands between the meander line and the present stream course, materially leaving a higher mean high-water mark. They have requested that a hearing be granted in order that they may prove their allegations.

The basis for appellants' charge of error in the determination of the mean high-water mark is by no means clear. Section 226 of *The Manual of Instructions for the Survey of the Public Lands, 1947*, provides that:

All navigable bodies of water and other important rivers and lakes \* \* \* are to be segregated from the public lands at mean high-water elevation. \* \* \*

\* \* \* \* \*

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Low-water mark is the point to which a river or other body of water recedes, under ordinary conditions, at its lowest stage. High-water mark is the line which the water impresses on the soil by covering it for sufficient periods to deprive it of vegetation. *Raide v. Dollar*, 203 P. 469 (1921). The shore is the space between the margin of the water at its lowest stage and the banks at high-water mark. *Alabama v. Georgia*, 64 U.S. 505 (1859).

Section 227 of the *Manual* provides that:

Mean high-water elevation will be found at the margin of the area occupied by the water for the greater portion of each average year; at this level a definite escarpment in the soil will generally be traceable, at the top of which is the true position for the engineer to run the meander line. A pronounced escarpment, the result of the action of storm and flood waters, will often be found above the principal water level, and separated from the latter by the storm or flood beach; another less evidence [sic] escarpment will often be found at the average low-water level, especially of lakes, the lower escarpment being separated from the principal escarpment by the normal beach or shore. \* \* \*

This appears to be the standard which was applied in the Bureau's determination of the meander line of the river in 1965, and there is nothing in the record that supports appellants' apparent charge that the meander line was established "where the water averages its height [sic] during the year," rather than at the mean high-water mark.

In response to appellants' allegations, the Idaho State Director, Bureau of Land Management, has stated that:

\* \* \* Inspection of \* \* \* [the United States Geological Survey quadrangle, Idaho Falls North] shows that the river would have had to raise about 15 feet to even get up to the levels of the bench comprising the river bank in sec. 13. Inspection also shows that any elevation higher than this would have flooded a large portion of the central part of the original townsite of Idaho Falls. The major portions of the newly surveyed areas in both secs. 12 and 13 are at a high or higher elevation than the original city. The river flows through a deep rock channel through these two sections and could not have been in any other location for many hundreds of years.

It is probably true that the river has flooded in the past during the spring or early summer runoff period which usually lasts from 4 to 6 weeks. However, this did not determine the mean high-water mark. The mean high-water mark is definitely within the rock channel of the river.

Some filling has been done by the City the past few years. The fill has been placed in the river channel along the road paralleling [sic] the river in sec. 13. It has not been done to raise the elevation. The purpose of the fill is to widen the roadway by filling in the river channel. Slack water at this point because of the falls dam one half mile downstream is not causing any erosion on the fill material.

However, the downstream dam appears to have raised the water elevation through sec. 13 over what it was when the original survey was made in 1877.

While it would appear superficially that there is a factual issue arising from the appellants' efforts to refute the Bureau's factual findings, on closer examination, no such issue has been developed. It is not possible at this time either to call upon the surveyor who first surveyed the township in question in 1877 to explain his work or to produce other witnesses who were then present in the area to testify as to the appearance of the river at that time. In these circumstances, the conditions which prevailed at the date of that survey can be determined only upon the basis of recorded survey data considered with presently observable geographic features. The available data appears fully to sustain the Bureau's finding that the course and bounds of the Snake River are now, and were in 1878, essentially as shown on the 1965 plats of survey and that the lands surveyed as omitted lands do not, and did not at any time material, lie within the bed or the banks of the Snake River. The appellants' apparently contrary allegations are not supported by evidence of any kind, or offer of evidence. In the absence of any explanation of the basis for their contentions, a hearing does not appear to be warranted upon this issue. Appellants' citation of authorities with respect to accretion and reliction is immaterial in the absence of any showing that these actions have, in fact, occurred.

Having found, then, no evidence of error in the Bureau's findings of fact, the question becomes one of the sufficiency of those findings to constitute the basis for a survey of public lands omitted from the original survey of T. 2 N., R. 37 E., for the authority and the duty of the Secretary of the Interior to consider and determine what lands are public lands, what public lands have been or should be surveyed, and what public lands have been or remain to be disposed of by the United States, and to extend or correct the surveys of public lands, as necessary, to include lands omitted from earlier surveys have been well established and require little comment. See *Kirwan v. Murphy*, 189 U.S. 35 (1903); *John McClennen et al.*, 29 L.D. 514 (1900); *State of Oregon*, 60 I.D. 314 (1949); *C. V. Branham Lumber Company*, A-26987 (November 26, 1954); *Bernard J. and Myrle A. Gaffney*, A-30327 (October 28, 1965).<sup>5</sup>

<sup>5</sup> The *Gaffney* decision has been challenged in *Gaffney v. Udall*, Civil No. 3-66-22 in the United States District Court for the District of Minnesota.

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The rule, cited by appellants, generally applicable in determining what land is conveyed under a patent of land bordering on a meandered body of water was stated by the Supreme Court in *Mitchell v. Smale*, 140 U.S. 406, 412-413 (1891), as follows:

\* \* \* We think it a great hardship, and one not to be endured, for the government officers to make new surveys and grants of the beds of such lakes after selling and granting the lands bordering thereon, or represented so to be. It is nothing more nor less than taking from the first grantee a most valuable, and often the most valuable part of his grant. Plenty of speculators will always be found, as such property increases in value, to enter it and deprive the proper owner of its enjoyment; and to place such persons in possession under a new survey and grant, and put the original grantee of the adjoining property to his action of ejectment and plenary proof of his own title, is a cause of vexatious litigation which ought not to be created or sanctioned. The pretence for making such surveys, arising from the fact that strips and tongues of land are found to project into the water beyond the meander line run for the purpose of getting its general contour, and of measuring the quantity to be paid for, will always exist, since such irregular projections do always, or in most cases, exist. The difficulty of following the edge or margin of such projections, and all the various sinuities of the water line, is the very occasion and cause of running the meander line, which by its exclusions and inclusions of such irregularities of contour produces an average result closely approximating to the truth as to the quantity of upland contained in the fractional lots bordering on the lake or stream. The official plat made from such survey does not show the meander line, but shows the general form of the lake deduced therefrom, and the surrounding fractional lots adjoining and bordering on the same. The patents when issued refer to this plat for identification of the lots conveyed, and are equivalent to and have the legal effect of a declaration that they extend to and are bounded by the lake or stream. Such lake or stream itself, as a natural object or monument, is virtually and truly one of the calls of the description or boundary of the premises conveyed; and all the legal consequences of such a boundary, in the matter of riparian rights and title to land under water, regularly follow.

*Cf. Railroad Company v. Schurmeir*, 74 U.S. (7 Wall.) 272 (1868).

The Court, in the same decision, recognized an exception to the stated rule when it said that:

We do not mean to say that, in running a pretended meander line, the surveyor may not make a plain and obvious mistake, or be guilty of a palpable fraud; in which case the government would have the right to recall the survey, and have it corrected by the courts, or in some other way. Cases have happened in which, by mistake, the meander line described by a surveyor in the field-notes of his survey did not approach the water line intended to be portrayed. Such mistakes, of course, do not bind the government. \* \* \* 140 U.S. at 413.



The rule and its exception have been the subject of numerous decisions of the courts and of this Department. In *Producers Oil Co. v. Hanzen*, 238 U.S. 325, 339 (1915), it was stated that:

\* \* \* [The cited cases] unquestionably support the familiar rule relied on by counsel for the Oil Company that in general meanders are not to be treated as boundaries and when the United States conveys a tract of land by patent referring to an official plat which shows the same bordering on a navigable river the purchaser takes title up to the water line. But they no less certainly establish the principle that facts and circumstances may be examined and if they affirmatively disclose an intention to limit the grant to actual traverse lines these must be treated as definite boundaries. It does not necessarily follow from the presence of meanders that a fractional section borders a body of water and that a patent thereto confers riparian rights.

The law was summarized again by the Court in *Lee Wilson & Company v. United States*, 245 U.S. 24, 29 (1917), as follows:

\* \* \* As a means of putting out of view questions which are not debatable we at once state two legal propositions which are indisputable because conclusively settled by previous decisions.

*First.* Where in a survey of the public domain a body of water or lake is found to exist and is meandered, the result of such meander is to exclude the area from the survey and to cause it as thus separated to become subject to the riparian rights of the respective owners abutting on the meander line in accordance with the laws of the several States. *Hardin v. Jordan*, 140 U.S. 371; *Kean v. Calumet Canal Co.*, 190 U.S. 452, 459; *Hardin v. Shedd*, 190 U.S. 508, 519.

*Second.* But where upon the assumption of the existence of a body of water or lake a meander line is through fraud or error mistakenly run because there is no such body of water, riparian rights do not attach because in the nature of things the condition upon which they depend does not exist and upon the discovery of the mistake it is within the power of the Land Department of the United States to deal with the area which was excluded from the survey, to cause it to be surveyed and to lawfully dispose of it. *Niles v. Cedar Point Club*, 175 U.S. 300; *French-Glenn Live Stock Co. v. Springer*, 185 U.S. 47; *Security Land & Exploration Co. v. Burns*, 193 U.S. 167; *Chapman & Dewey Lumber Co. v. St. Francis Levee District*, 232 U.S. 186.

The determination as to whether a particular situation falls within the general rule or the exception to it is in close cases difficult to make. Compare *Producers Oil Company v. Hanzen*, *supra*, and *Jeems Bayou Fishing & Hunting Club v. United States*, 260 U.S. 561 (1923), with *United States v. Lane, et al.*, 260 U.S. 662 (1923), and compare *C. V. Branham Lumber Company*, *supra*, with *Ralph L. Bassett, Edwin J. Keyser*, A-27372 (May 20, 1957). The area of the land omitted as

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compared with the area patented, the value of the land at the time of the original survey, the difficulty involved in surveying the land due to its topography, and the distance of the original meander line from the actual water line are some of the factors that are considered in making this determination.

Turning then to the particular facts of this case, it is readily apparent that the Bureau and the appellants have not relied upon the same criteria in comparing the area of the omitted lands with the area of the adjacent surveyed lands. The appellants assert that "in comparison to the amount of land platted to said patentee, 160.52 acres, said approximately 28 acres constitutes less than 19 percent of the original patented area."<sup>6</sup> On the other hand, as we have already noted, the Chief, Division of Engineering, found that "in section 12 there are 79.95 acres of omitted land fronting the 114.04 acres of adjoining patented land, which omission constitutes 70 percent of the patented land" and that "[i]n section 13 there are 29.68 acres of omitted land which is 43 percent of the areas of the 68.40 acres of adjoining patented backlands."

The subdivisions of land described in the patent to Damme which, according to the 1878 survey plat, fronted on the river are as follows:

- Lot 4, sec. 12, containing 20.74 acres,
- Lot 1, sec. 13, containing 44.24 acres,
- Lot 2, sec. 13, containing 20.70 acres,
- Lot 3, sec. 13, containing 3.84 acres,

or an aggregate of 89.52 acres.

Between lot 4, sec. 12, and the river, according to the 1965 survey, are lots 14 and 15, containing 4.97 acres and 15.25 acres, respectively, a total of 20.22 acres. Between lots 1, 2 and 3, sec. 13, and the river lies an area, surveyed as a part of the Highland Park Addition to Idaho Falls, of 29.68 acres. In addition, forming a part of the same body of "omitted" land, there are 59.73 acres of newly surveyed lands in lots 9, 10, 11, 12 and 13, sec. 12, fronting on 93.30 acres of land in lots 1, 2

<sup>6</sup> Apart from any consideration of the proper basis for comparison, the appellants have erred somewhat in the figures used for comparison. The area of the land conveyed to William Damme in 1888, according to both the patent and 1878 plat of survey, was 169.52 acres, rather than 160.52 acres as stated by the appellants. In referring to "approximately 28 acres" of omitted land, the appellants apparently considered only the area (29.68 acres) fronting on lots in sec. 13 while overlooking the area (20.22 acres) fronting on land in sec. 12 which was patented to Damme.

and 3, sec. 12. Depending upon the method of comparison used, then, we find that the newly surveyed lots adjacent to lands conveyed to William Damme contain 49.90 acres, equal to approximately 29 percent of the total area described in the patent to Damme, or approximately 56 percent of the 89.52 acres attributed to the surveyed lots to which the new lots are adjacent, or the entire tract of 109.63 acres of newly surveyed land in secs. 12 and 13 is equal to 60 percent of the 182.82 acres of land contained in all of the adjacent previously surveyed lots. Thus, we see that comparison of the areas in question can lead to a variety of results, depending upon the basis for comparison.

A comparison of the areas of controversy in some of the leading cases involving surveys of omitted lands discloses the following:

	Area of surveyed lands conveyed	Area of newly surveyed lands in dispute
<i>Horne v. Smith</i> , 159 U.S. 40 (1895)-----	170.42 acres-----	Approximately 600 acres.
<i>French-Glenn Livestock Company v. Springer</i> , 185 U.S. 47 (1902).-----	158.53 acres-----	Approximately equivalent.
<i>Kirwan v. Murphy</i> , <i>supra</i> -----	859.38 acres-----	1,202.00 acres.
<i>Producers Oil Co. v. Hanzen</i> , <i>supra</i> -----	12.84 acres-----	40.00 acres.
<i>Jeems Bayou Fishing &amp; Hunting Club v. United States</i> , <i>supra</i> .-----	48.00 acres-----	85.22 acres.
<i>C. V. Branham Lumber Company</i> , <i>supra</i> -----	35.85 acres-----	13.44 acres.
	17.65 acres-----	19.35 acres.
	27.10 acres-----	10.08 acres.
	40.30 acres-----	39.67 acres.
	53.85 acres-----	17.42 acres.
<i>Railroad Company v. Schurmeir</i> , <i>supra</i> -----	9.28 acres-----	2.78 acres.
<i>Mitchell v. Smale</i> , <i>supra</i> -----	4.53 acres-----	25.00 acres.
<i>United States v. Lane</i> , <i>supra</i> -----	26.80 acres-----	5.67 acres.
	23.00 acres-----	12.72 acres.
	155.00 acres-----	27.87 acres.
	114.80 acres-----	11.49 acres.
	271.00 acres-----	97.64 acres.
<i>Thomas B. Bishop Co. v. Santa Barbara County</i> , 96 F. 2d 198 (9th Cir. 1938).-----	15,000.00 acres-----	25.00 acres.

In the first six cases listed the newly surveyed lands were found to have been properly surveyed as omitted lands of the United States, while in the last four cases the courts refused to sustain surveys of

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omitted lands and found, rather, that title to the areas in question had passed from the United States by patents issued on the basis of the original surveys prior to the execution of the surveys of omitted lands. It is not easy to find here, upon the basis of area comparison,<sup>7</sup> a clear rule that has been consistently applied and that would offer a ready solution to the problem in the present case. However, it is noted that in most cases where the finding of omitted lands has been sustained the bodies of omitted land have been relatively large in comparison with the areas of adjacent surveyed uplands, while in most cases in which that finding has not been sustained the omitted areas have been relatively small.<sup>8</sup>

The present case, so far as the area of land involved is concerned, lies somewhere among the situations represented by most of the cited cases, but it is essentially comparable with the *Branham Lumber* case, *supra*, in which the Department found that there were omitted lands belonging to the United States. The area found here to have been omitted from the original survey is not as great, in comparison with the acreage conveyed, as that found in any of the first five cases noted above. However, the 109.63 acres of land found in this one tract in secs. 12 and 13 does constitute a substantial body of land.

There is no evidence in the record that the course of the river was so difficult to define at the point in question or that the nature of the terrain was such as to make a more accurate delineation of the river's course unfeasible. As we have noted, the Bureau's survey data shows that the river flows through a deep rock channel through the two sections in question and, apparently, has done so for hundreds of years.

<sup>7</sup> The basis for comparison has not always been clearly set forth in the decisions. It appears that all of the bases for comparison to which we adverted have been used, and none appears to have received official sanction as the proper basis. In some cases the surveyed lands were described simply as fractional sections, rather than as lots, and, in *Thomas B. Bishop Co. v. Santa Barbara County*, *supra*, where the patented land, a Mexican grant, was surveyed as a body, the whole of that body of land was the smallest subdivision for comparison.

<sup>8</sup> In one of the several disputes involved in the *Lane* case, *supra*, the 97.64 acres of newly surveyed land found to exist in one compact body formed a greater area than the tracts found in *Producers Oil Co. v. Hansen*, *supra*, and *Jeems Bayou Fishing & Hunting Club v. United States*, *supra*, to constitute omitted land. The Court found, however, that the evidence justified the conclusion that in 1839 the establishment of a line precisely coincident with the water's edge would have been a matter of expense and difficulty wholly disproportionate to the then value of the omitted acreage, that the failure to run the lines with particularity was not unreasonable and that the waters of the lake, rather than the traverse line, were properly found to constitute the boundary. Again, in *Mitchell v. Smale*, *supra*, the area of the omitted land was not great as an entity, yet it was approximately six times the area of the surveyed lot of which it was a part. Thus, any effort to relate the determination to area alone without consideration of other factors would appear to be unwarranted.

The record shows also that the meander line established in the original survey, for a distance of approximately  $1\frac{1}{2}$  miles in secs. 12 and 13, follows a course that does not touch the actual course of the river and which varies from the true water course by as much as 15 chains, and it clearly shows that meander corners were established at points within that distance which reflect something other than the bank of the river. It undoubtedly was easier, of course, to follow the nearly straight line depicted on the original survey plat than to follow the actual course of the river, but the omission of an area of land of the size represented here does not appear to be the result of a reasonably accurate representation of the river's course. It is not necessary, however, to determine the cause of error. The results are the same whether the error arose from mistake, inadvertence, incompetency or fraud on the part of the men who made the former survey. *John McClennon et al., supra.*

The field notes of the 1965 survey reveal that the reason for that survey was that:

Examination of the original surveys disclosed that along certain portions of the river the survey of the original meanders was grossly erroneous or fictitious, resulting in the omission of large areas of land from the original survey. Where this condition exists, the recorded original meanders are reestablished as boundaries of public land.

Upon review of the factual evidence contained in the record and the applicable law we are persuaded that the nature and the extent of the error demonstrated in the original survey are sufficient to bring this case within the exception to the rule that the water line rather than the meander line constitutes the boundary of a surveyed tract of land and that the Bureau of Land Management was warranted in surveying the omitted lands and in asserting claim to them as public lands of the United States.<sup>9</sup> Accordingly, appellants' protest was properly dismissed.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision appealed from is affirmed.

FRANK J. BARRY,  
*Solicitor.*

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<sup>9</sup> The fact that the Department determines that an omitted area is sufficiently extensive to warrant claiming it as public land and thereupon surveys and disposes of it does not finally settle the question of the ownership of the newly surveyed area. The legal questions are subject to reexamination in the courts, and the courts may either agree that the omitted land is public land or find that the omitted land passed with the patent of the abutting land. *Kirwan v. Murphy, supra*; *C. V. Branham Lumber Company, supra.*

## A. M. SHAFFER ET AL., BETTY B. SHAFFER

A-30561, A-30563 *Decided October 7, 1966***Oil and Gas Leases: Applications: Generally—Regulations: Applicability—Regulations: Interpretation**

Regulations should be so clear that there is no basis for an oil and gas lease applicant's noncompliance with them before they are interpreted so as to deprive him of a statutory preference right to a lease.

**Oil and Gas Leases: Applications: Attorneys-in-Fact or Agents—Oil and Gas Leases: Applications: Sole Party in Interest—Oil and Gas Leases: First Qualified Applicant—Regulations: Applicability**

The regulations requiring an agent of an offeror for an oil and gas lease to accompany the offer with evidence of the agent's authority to sign the offer in behalf of the offeror will not be applied to reject offers filed in the name of a person who is indicated in a supplemental statement to the offer to be acting as an agent for another person who has 100 percent interest in the lease and offer and is designated as a party in interest on the offer form, where the language of the regulations does not clearly require such evidence when the offer is in the name of the agent as the offeror and signed by him as offeror. Also, the agent will not be deemed unqualified to obtain a lease in his own name simply because another person is to obtain 100 percent interest in the lease and the other person's interest in the lease and offer is revealed, in the absence of clear regulatory provisions prohibiting such a practice.

**Applications and Entries: Priority—Oil and Gas Leases: Applications: Sole Party in Interest**

An oil and gas lease offer when filed is defective under the regulations when the offeror states that she is not the sole party in interest and indicates that another person will acquire full interest in the lease, but does not properly identify the individual by stating both his given and his surname; however, the offer may be considered as being cured and having priority when a supplemental statement is submitted signed by the offeror and the other interested party properly identifying him.

**APPEALS FROM THE BUREAU OF LAND MANAGEMENT**

Separate appeals to the Secretary of the Interior have been filed by Messrs. A. M. Shaffer and D. E. Sanburg (A-30561) and by Mrs. Betty B. Shaffer (A-30563) from separate decisions by the Chief, Branch of Mineral Appeals, Office of Appeals and Hearings, Bureau of Land Management, dated September 20, 1965, affirming land office decisions rejecting oil and gas lease offers or canceling oil and gas leases. Because the two appeals involve similar issues concerning the parties in interest in oil and gas lease offers, they have been consolidated for the purposes of this decision.

The appeal of Messrs. Shaffer and Sanburg concerns the affirmance of Wyoming land office decisions, dated March 12, 1965, rejecting 24

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oil and gas lease offers filed either January 26 or 27, 1965, with Mr. Shaffer named as the offeror.<sup>1</sup> In Item 6 of the lease offer form the offeror checked a statement that he "is not the sole party in interest" and stated that "D. E. Sanburg will acquire an interest." On February 9, 1965, within 15 days from the date the offers were filed, the following statement signed by A. M. Shaffer and D. E. Sanburg was submitted for each of the offers:

This statement is submitted in accordance with the regulations, and D. E. Sanburg and A. M. Shaffer hereby state that by verbal agreement A. M. Shaffer was appointed as agent for D. E. Sanburg to check, prepare and file the above described application and A. M. Shaffer is to receive a cash compensation only for doing the work. D. E. Sanburg owns 100% interest in the offer and lease. There is no agreement or understanding between them or any other person, either verbal or written by which A. M. Shaffer or any other person, is to receive any interest in any operating agreements under the lease.

It is further stated that both D. E. Sanburg and A. M. Shaffer are native born citizens of the United States and neither of their interests, direct or indirect in oil and gas leases, applications or offers and options exceed 246,080 acres in the State of Wyoming.

Mrs. Shaffer's appeal also stems from action by the Wyoming land office, affirmed by the Director, taken in decisions dated March 11, 1965, which rejected 38 oil and gas lease offers filed in her name on January 25, 1965, and canceled 45 oil and gas leases issued effective March 1, 1965, pursuant to other offers she had filed on January 25, 1965. In Item 6 of the lease offer form, Mrs. Shaffer also indicated that she was not the sole party in interest in the lease, and on each form listed the name of a person who was to acquire, or had an interest in the lease. The wording of this statement varied somewhat on the forms.<sup>2</sup> However, within 15 days from the filing of the offer identical signed statements, except as to the name of the party listed in Item 6 and as to his or her acquisition of citizenship were filed. They read as follows:

Pursuant to R.S. 2478; 43 U.S.C. 1201, Subpart 3123.2(d) (1) \_\_\_\_\_  
[here and elsewhere where a blank space is left in this quotation appeared the name of the person indicated in Item 6] has entered into an oral agreement with

<sup>1</sup> The serial numbers of the oil and gas lease offers involved in this appeal (A-30561) by Messrs. Shaffer and Sanburg are listed in Appendix A of this decision, p. 303.

<sup>2</sup> The statement made on the lease offer form in Item 6 is set forth opposite the serial numbers of the oil and gas lease offers or leases involved in Mrs. Shaffer's appeal (A-30563) in Appendix B, p. 304 of this decision. The appeal as to three of the leases, Wyoming 0314524, 0314525, and 0314528 was withdrawn by the appellant, and dismissed by a decision of this office dated March 15, 1966 (A-30563a), and those serial numbers are not listed in the appendix.

One offer, Wyoming 0314527, which was rejected by the land office and listed in the appeals to the Director, Bureau of Land Management, and to the Secretary, is not listed in the Bureau appeal decision. This apparently was through inadvertence as the decision correctly gave the number of offers as 38, although it listed only 37 serial numbers for offers. In the exercise of the Secretary's supervisory authority, the appeal will be considered as to the rejection of that offer, and it is listed in the appendix of this decision despite the omission in the decision below.

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Betty Shaffer relative to the above described application or lease number, constituting Betty Shaffer as his agent for the purpose of filing said application or lease. \_\_\_\_\_ and Betty Shaffer hereby state that there is no agreement or understanding between them or with any other person, either oral or written, by which Betty Shaffer or such other person has received or is to receive any interest in the lease when issued, including royalty interest or interest in any operating agreements under the lease. The oral agreement between the parties is that Betty Shaffer is to receive a cash consideration based solely on an hourly rate for the checking, preparation and filing of said application.

Betty Shaffer is a native born citizen of the United States and her direct or indirect interests in oil and gas leases, applications and offers therefor do not exceed 246,080 acres in this State.

\_\_\_\_\_, who is to acquire a 100% interest in the above application or lease is a native born citizen of the United States [as to several of the persons this statement indicated that they were naturalized citizens] whose direct or indirect interests in oil and gas leases, applications or offers therefor and options do not exceed 246,080 acres in this State.

Both of the statements quoted above which were filed to supplement the offers filed in the name of Mr. Shaffer or Mrs. Shaffer contain substantially the same information and set forth a similar relationship between either of them and the party in interest named in the particular statement.

The land office considered all of the offers to be defective on two grounds. The first was that the named offerors were not qualified applicants for the leases since the statements filed showed that they were simply employed as agents for the real parties in interest and had no interest in the offers or leases. The second was that the offers could not be considered as properly filed by the Shaffers as agents for the other persons, because there was no disclosure of the agency relationship at the time of the filing of the offers and even if there had been, the offers were not accompanied by statements setting forth the interests of the agent and principal as required.

The land office decisions were affirmed on appeal to the Director but the grounds of affirmance are not too clear. Seemingly, it was on the basis that the evidence required when an offer is filed or submitted (signed) by an agent for another was not furnished. The Bureau's decisions referred to the fact that no evidence was furnished as to the Shaffers' authority to sign the lease offers for the other parties or as to any commitment on their part to assign the leases, if issued, to those parties.

The following provisions in the regulations are relevant in considering these appeals:

43 CFR 3123.1(d)—Each offer must be \* \* \* signed \* \* \* by the offeror or the offeror's duly authorized attorney in fact or agent. \* \* \*

43 CFR 3123.2—Each offer, when first filed, shall be accompanied by :

\* \* \* \* \*



(c) (1) \* \* \* evidence of the authority of the attorney-in-fact or agent to sign the offer and lease, if the offer is signed by such attorney or agent on behalf of the offeror. \* \* \*

(2) A statement over the offeror's signature setting forth whether the offeror's direct and indirect interests in oil and gas leases, applications, and offers therefor and options exceed 246,080 acres in the same State of which no more than 200,000 acres are under option \* \* \* and in addition, if the offeror is an individual, a statement of his citizenship.

(3) A signed statement by the offeror that he is the sole party in interest in the offer and the lease, if issued; if not he shall set forth the names of the other interested parties. If there are other parties interested in the offer a separate statement must be signed by them and by the offeror, setting forth the nature and extent of the interest of each in the offer, the nature of the agreement between them if oral, and a copy of such agreement if written. Such separate statement and written agreement, if any, must be filed not later than 15 days after the filing of the lease offer. All interested parties must furnish evidence of their qualifications to hold such lease interest.

(d) (1) If the offer is signed by an attorney in fact or agent it shall be accompanied by separate statements over the signatures of the attorney in fact or agent and the offeror stating whether or not there is any agreement or understanding between them or with any other person, either oral or written, by which the attorney in fact or agent or such other person has received or is to receive any interest in the lease when issued, including royalty interest or interest in any operating agreement under the lease, giving full details of the agreement or understanding if it is a verbal one. The statement must be accompanied by a copy of any such written agreement or understanding. If such an agreement or understanding exists, the statement of the attorney in fact or agent should set forth the citizenship of the attorney in fact or agent or other person and whether his direct and indirect interests in oil and gas leases, applications, and offers including options for such leases or interests therein exceed 246,080 acres in any one State, of which no more than 200,000 acres may be held under option, \* \* \*. The statement by the principal (offeror) may be filed within 15 days after the filing of the offer. \* \* \*

Regulation 43 CFR 3123.3(b) provides that an offer not in accordance with the regulations will be rejected and will afford the offeror no priority.

The appellants object to the reasoning in the Bureau decisions. Among other matters they refer to the definitions given in the regulations of "sole party in interest" and "interest" contained in 43 CFR 3100.0-5(a), which reads as follows:

\* \* \* A sole party in interest in a lease or offer to lease is a party who is and will be vested with all legal and equitable rights under the lease. No one is, or shall be deemed to be, a sole party in interest with respect to a lease in which any other party has any of the interests described in this section. The requirement of disclosure in an offer to lease of an offeror's or other parties' interest in a lease, if issued, is predicted on the departmental policy that all offerors and other parties having an interest in simultaneously filed offers to lease shall have an equal opportunity for success in the drawings to determine priorities. Additionally, such disclosures provide the means for maintaining adequate records of acreage holdings of all such parties where such interests constitute chargeable acreage holdings. An "interest" in the lease

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includes, but is not limited to, record title interests, overriding royalty interests, working interests, operating rights or options, or any agreements covering such "interests." Any claim or any prospective or future claim to an advantage or benefit from a lease, and any participation or any defined or undefined share in any increments, issues, or profits which may be derived from or which may accrue in any manner from the lease based upon or pursuant to any agreement or understanding existing at the time when the offer is filed, is deemed to constitute an "interest" in such lease.

The appellants contend that the purposes as stated in this regulation for requiring the disclosure of the parties in interest in an offer or lease, i.e., to provide equal opportunity in drawing and to provide a means of maintaining acreage holdings records, have been fully satisfied by the offers and statements filed by them. Appellants also contend that the Bureau decisions overlook the fact that although the other party in interest in each offer will acquire a 100 percent interest in the lease when it is assigned to him the holding of the mere naked legal title is an interest within the definition, and thus the Bureau is wrong in concluding that they have no interest whatsoever in the lease offers. They also contend that there is no prohibition in the Mineral Leasing Act of 1920, as amended, September 2, 1960, 74 Stat. 790, 30 U.S.C. § 181 *et seq.* (1964), and in the regulations against the procedure which they used in filing the lease offers with the understanding that another person would ultimately receive the full interest both legal and equitable upon assignment to them after the lease issued. Instead, they contend that the Bureau has expressly permitted the filing of lease offers by persons who have made a showing that 100 percent interest in the lease when issued will be in another person. Most of the documents they have submitted as "proof" of this are lease offers with a statement signed by the named offeror and another indicating that the lease will be assigned to the other party when it is issued, and indicating the holdings as to acreage and the citizenship of both parties. They contend that the Bureau's distinction of such cases on the grounds that in these other cases the agents' actions were authorized and the agents were committed to assigning the offers and leases is not valid. Appellants contend that there is no real difference between these cases and their filings and that their offers should be accepted as meeting the requirements just as much as those referred to by them. They also contend that the decisions by the Bureau penalize good faith and honesty and put a premium on dishonesty, since if they failed to disclose the other parties in interest there is no question but that leases would have been issued to them.

The appellants also contend that the procedure followed by them has been used for years by knowledgeable major oil companies and that all Rocky Mountain area land offices have approved the procedure.

They contend that the action by the Bureau as to their offers and leases is a change from recognizing this procedure, and that it should not be made without affording those affected thereby adequate notice published in the *Federal Register*, and should operate prospectively rather than retrospectively. They contend that the regulations are not so clear as to demonstrate that the procedure they followed was in violation of them—as indicated by the recognition by the Bureau of similar procedures in other cases. They suggest that, if the regulations are so uncertain and incapable of being clearly understood, they should not be applied to their detriment, since many cases have held that where a person is to be deprived of a statutory preference right because of his failure to comply with a requirement of a regulation, that regulation should be so clear that there is no basis for disregarding his non-compliance. They also suggest that where there is doubt as to the regulation or where a practice has prevailed inconsistent with a new interpretation of a regulation, there is authority by which the Secretary can waive the requirement so that the new interpretation will be given prospective application only, citing *Franco Western Oil Company et al.* (Supp.), 65 I.D. 427 (1958), upheld in *Safarik v. Udall*, 304 F. 2d 944 (D.C. Cir. 1962); *cert. denied*, 371 U.S. 901.

Mrs. Shaffer adds further arguments concerning the cancellation of the leases. Briefly, she contends that a defect in the recitals in the offer to lease and in the form of the supporting statements of interest is not a ground for administrative cancellation of the issued leases under the Mineral Leasing Act and applicable regulations. She also requests that if the Director's decision is reversed the leases should be redated as of the first of the month following the decision on appeal, since development of the issued leases has been interrupted by these proceedings.

Whether the cancellation of the leases was proper depends upon whether the offers were defective when the leases issued pursuant to them. This depends upon whether the Bureau was correct in concluding that the offers violated the regulations.

In considering whether regulations should be interpreted to the detriment of persons seeking oil and gas leases who would have a statutory preference to a lease, it is true, as appellants have contended, that the regulations should be so clear that there is no basis for the applicants' noncompliance, and if there is doubt as to their meaning and intent such doubt should be resolved favorably to the applicants. See *William S. Kitroy et al.*, 70 I.D. 520 (1963); *Donald C. Ingersoll*, 63 I.D. 397 (1956). We turn then to a consideration of the regulations and their applicability to the circumstances presented here in the light of this principle.

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The regulation requiring the showing as to evidence of authority of the agent and the statement of interest by the agent formerly required the statement not only where the offer was signed by an attorney in fact or agent (as the regulation now provides) but also where the attorney in fact or agent had been authorized to act on behalf of the offeror with respect to the offer or lease, 43 CFR 192.42(3)(4) (1954 ed.). In applying this regulation, the United States Court of Appeals for the 10th Circuit found that where an offer in the name of a principal had been signed by the principal himself, but an agent had authority to act in his behalf as to the lease both before and after the offer to lease was filed, the agent was properly required to furnish the statement and the offer was defective in the absence of such a statement. *Pan American Petroleum Corp. v. Udall*, 352 F. 2d 32 (10th Cir. 1965), upholding *Charles B. Gonsales et al.*, 69 I.D. 236 (1962), and distinguishing, upon the basis of a difference in showing as to the agent's continuing authority, *Foster v. Udall*, 335 F. 2d 828 (10th Cir. 1964), which reversed *Eugenia Bate*, 69 I.D. 230 (1962). The Court in *Pan American* and also a Court in another case applying the same regulation, *Robertson v. Udall*, 349 F. 2d 195 (D.C. Cir. 1965), emphasized that the type of work performed by the undisclosed agent in preparing the forms, in some instances selecting the lands, and negotiating for the sale of the leases was the very type of agency relationship contemplated by the regulations. In the *Robertson* case, *supra*, indeed, some of those actions were not performed by the agents, yet the agency relationship and the applicability of the regulation as determined in the Departmental decision, *Evelyn R. Robertson et al.*, A-29251 (March 21, 1963), was upheld.

In those cases, the name of the agent and his relationship to the principal and interest in the offer were not disclosed when the offer was filed. In the cases before us, with one exception, the names of the principal and agent are disclosed in the offer; all that is lacking is the nature of their relationship and extent of interest. The primary answer which the Office of Appeals and Hearings made in response to appellants' contentions that the requirements of the regulations had been satisfied by their offers and statements, was that the appellants had offered no explanation of their failure to furnish evidence with the lease offers establishing that the person who was named as the offeror was in fact authorized to sign the offers in his or her own name as the party in interest who was committed to assign the leases, if issued, to the person named as having an interest, or that he was authorized to sign the offers in his own name as an agent for such person.

It is true that the Shaffer offers did not comply with the agency provisions when filed since they were not accompanied by evidence

of the authority of the agent to sign in behalf of the offerors nor was there submitted with them the statement required of an agent concerning his arrangements with his principal. However, it is our conclusion that the agency provisions are not so clearly applicable that appellants should be held to compliance with them.

The agency provisions make a clear distinction between the agent and the offeror. They also clearly refer to signing of the offer by the agent in behalf of the offeror. They could be read then to apply only to those offers where the principal is named as the offeror and the agent signs in his behalf as his agent.<sup>3</sup> As previously pointed out, under the former wording of the regulation a statement was required even though the agent did not actually sign the offer in behalf of the offeror. The Court in the *Pan American* case, *supra*, noted (at 35) that the regulation had been replaced "by an apparently more sensible one requiring directly the disclosure of all outstanding interests in offers to lease." From the discussion in that case it would appear that the situation it involved would be considered covered now by 43 CFR 3123.2(c)(3), the sole party in interest regulation and that the agency regulation could, not unreasonably, be interpreted by offerors as covering only situations where the principal is named as the offeror and the agent signs the offer expressly as his agent.

There is no provision in the regulations which clearly requires an agent who files an offer in his own name and lists the party who will ultimately have the full interest in the lease to show that he has any authority to sign the offer in his own name. Furthermore, there does not appear to be any advantage to appellants from following the course that they did rather than to name the principal as the offeror and sign as his agent. As the appellants have pointed out, the individual named as the offeror is chargeable with the full acreage of the offer and lease, and so also is the other party designated as having the 100 percent interest. The interests of both the agent and principal have been revealed so neither of them could obtain any advantage in a drawing of simultaneously filed offers. The qualifications of both to hold a lease have been set forth so there is no question in that respect. In short, the purpose of disclosure underlying the agency provisions is satisfied by compliance with the real party in interest provision.

Since neither the letter nor the spirit of the agency regulation has been clearly violated in these circumstances, we believe that any doubt as to the application and interpretation of the regulation should be resolved in the appellants' favor and that they should not be penalized for failing to comply with provisions of the regulation whose applicability is far from certain.

<sup>3</sup> The mandatory oil and gas offer and lease form (4-1158) has two lines for signature by the offeror, one designated for "(Lessee signature)," the other for "(Attorney-in-fact)." The Shaffers signed all the offers on the lessee signature line.

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Accordingly, we conclude that the agency provisions of the regulations are not to be applied to an offer filed by an agent in the circumstances of these appeals. If it is felt that the practice followed by the appellants is objectionable, the regulations should be amended to make the offerors' obligations clear.

There remains the question of whether the offers satisfy the requirements of the sole party in interest provisions of the regulations.

Since each of the Shaffers was named as the offeror and since each of them indicated at the time the offers were filed that he or she was not the sole party in interest and (with one exception) indicated the name of another person who had or would have an interest in the lease, they complied with regulation 43 CFR 3123.2(c)(3). That regulation also required a further statement of the nature and extent of the interest of all parties in interest and the nature of the agreement between them to be filed within 15 days of the filing of the lease offer, together with evidence of the interested parties' qualifications to hold such a lease interest.

Although the statements were timely filed, the land office and the Bureau found them objectionable. The land office concluded that they revealed the person signing the offer to be not qualified as an "offeror" because the supplemental statements filed by each of the Shaffers and the "other party in interest" in the lease indicate that the other party "owns" or "is to acquire" a 100 percent interest in the application (offer) or lease, and that Mr. or Mrs. Shaffer had been appointed only as the agent for the other party in preparing and filing the application and was to receive only a cash compensation for the work. It held that if the other party in interest has 100 percent interest in the lease or offer, the Shaffers could not be qualified offerors. However, it is true, as the appellants have indicated, that a "naked" legal title may be held by one person with a 100 percent equitable interest in another. Under 43 CFR 3100.0-5(a) a sole party in interest in a lease or offer to lease is defined as one who is and will be vested "with all legal and equitable rights under the lease." With the offer in the name of Mr. or Mrs. Shaffer, neither he nor she nor the other party in interest can be considered to be a sole party in interest. The regulation states that an "interest" in a lease includes, but is not limited, to "record title interests" and other described interests. Thus, an offeror who is to retain only the legal title in a lease, if issued, may properly file an oil and gas lease offer, provided he indicates that he is not the sole party in interest and otherwise satisfies the regulation.

The Office of Appeals and Hearings did not discuss the objection of the land office but objected to the fact that the parties in this case failed to spell out how the full interest in the lease—including the legal

title—would be obtained by the other party in interest. It said that no evidence was submitted that the Shaffers were committed to assign any lease that was issued to the principal. There is only one way in which parties can obtain recognition by this Department of legal title in someone other than the person named as offeror and lessee, when the lease issues, and this is by filing an assignment which must be approved by this Department before the lessee-assignor is relieved of his obligations under the lease and the assignee accepted in his place. See 43 CFR 3128.2(e). Regulation 43 CFR 3123.2(c)(3) requires that the nature of the agreement between the parties, if oral, which is applicable here as the parties have asserted that the agreement was oral, must be set forth. The parties have indicated the extent of the interest that the other party will acquire and the basis of the consideration of the persons in whose name the offer is filed. Since statements of agreements should be interpreted in a reasonable and sensible manner, it is proper to assume that the agreement implies an understanding that the transfer of the legal title will be made in the customary and required method. Thus, I believe that the spirit of the regulation is satisfied by the information given by the appellants and that the “nature” of the agreement has been shown, although all of the details as to means of executing the agreement have not been set forth. The requirement which the Bureau attempts to impose here would require the means of executing the agreement as well as the extent of the interest of the parties. This does not appear warranted without some express language in the regulation.

Accordingly, the offers here, with one exception regarding priority of filing, can be upheld as coming within the requirements of 43 CFR 3123.2(c)(3). We must conclude then that the decisions of the Bureau are erroneous.

The one exception referred to above is an offer filed by Mrs. Shaffer, Wyoming 0314478. That offer indicated that she was not the sole party in interest and stated “Marvin will acquire full interest in lease.” Since the one name “Marvin” is not an adequate identification of the person who was to acquire the interest in the lease, the offer was clearly deficient when it was filed under 43 CFR 3123.2(c)(3) as the names of the other interested party must be set forth with the lease offer when it is filed. This would require at the least both the given name and the surname of an individual, if the interested party is an individual. However, that provision also permits the filing of a separate statement by the offeror and other parties in interest within 15 days after the filing of the lease offer. Such a statement was filed as to this offer which identified the party in interest as Marvin Wolf. Since this identification is clear from that statement the deficiency may be considered cured at that time and the offer may be considered as having

priority as of the date the statement was filed. Cf. *Laurie B. Webb*, A-30458 (November 30, 1965); *Timothy G. Lowry*, A-30487 (March 16, 1966).

The remaining question to be resolved pertains to Mrs. Shaffer's request that the leases which were erroneously canceled by the Bureau decisions be redated as of the first of the month following this decision. She states that there are no statutory or regulatory provisions expressly applicable to such a situation where a notice of cancellation is issued, but suggests that the leases are basically in the same position as the offers, and that leases issued pursuant to the offers would be dated only as effective after this decision issues.

Generally leases are issued as effective the first day of the month following the filing of all required documents for the lease offer. Since appellant points to no statutory or regulatory authority for re-dating the leases, and since the appeal had the effect of suspending the effect of the land office's action in canceling the leases, leaving the leases in operation during the appeal, we see no basis for changing the statutory term of the lease by "redating" them. Her request is denied.

The request for oral argument made by some of the appellants is also denied in view of the decision reached here.

Accordingly, the decisions of the Bureau are reversed and the case records returned to the Bureau for further consideration. If all else be regular, the leases shall be considered as effective on the date stated on the lease forms, and the lease offers shall be considered as having priority as of the date they were filed, with the exception of lease offer Wyoming 0314478, which shall have priority as of the date the supplemental statement was filed.

ERNEST F. HOM,  
*Assistant Solicitor.*

## APPENDIX A (A-30561)

### *Lease Offer Serial Numbers*

Wyoming 0314595	Wyoming 0314623	Wyoming 0314661
0314596	0314624	0314676
0314597	0314641	0314677
0314609	0314642	0314679
0314610	0314643	0314680
0314617	0314658	0314681
0314620	0314659	0314682
0314622	0314660	0314687



## APPENDIX B (A-30563)

(1) *Lease Offers*

<i>Serial Numbers</i>	<i>Statement in Item 6</i>
Wyoming 0314477 <sup>4</sup> -----	Marvin Wolf will have interest in lease.
Wyoming 0314478 <sup>4</sup> -----	Marvin will acquire full interest in lease.
Wyoming 0314498 <sup>4</sup> , 0314631-	Marvin Wolf will acquire interest in lease.
Wyoming 0314577, 0314578, 0314579, 0314580, 0314582.	Marvin Wolf will acquire an interest.
Wyoming 0314520, 0314526, 0314527 <sup>5</sup> , 0314529, 021-3530, 0314532, 0314533.	Melvin Wolf will acquire interest in lease.
Wyoming 0314581, 0314583, 0314584, 0314586, 0314587, 0314588, 0314589.	Melvin Wolf will acquire an interest.
Wyoming 0314557, 0314558, 0314559, 0314560.	Elaine Wolf will acquire an interest.
Wyoming 0314511, 0314512, 0314513.	Samuel Mandel will acquire interest in this lease if issued.
Wyoming 0314517, 0314518, 0314519.	Samuel Mandel will acquire interest in lease.
Wyoming 0314499, 0314500, 0314501, 0314502, 0314503.	Etta Mandel will acquire interest in lease.

(2) *Leases*

Wyoming 0314470, 0314471, 0314472, 0314473, 0314474, 0314475, 0314476, 0314479, 0314481, 0314482, 0314483, 0314484, 0314485, 0314486, 0314487, 0314488, 0314490, 0314491, 0314492, 0314493, 0314494, 0314495, 0314496, 0314497.	Marvin Wolf will acquire interest in lease.
Wyoming 0314521 <sup>4</sup> -----	Melvin Wolf will acquire interest in lease, if issued.
Wyoming 0314522, 0314523, 0314531, 0314534, 0314535, 0314536, 0314537, 0314538.	Melvin Wolf will acquire interest in lease.

See footnotes at end of table.

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(1) *Lease Offers—Continued*

*Serial Numbers*

*Statement in Item 6*

Wyoming 0314549, 0314550, Elaine Wolf will acquire an interest.  
0314551.

Wyoming 0314516----- Samuel Mandel will acquire interest in  
lease.

Wyoming 0314504, 0314505, Etta Mandel will acquire interest in  
0314506, 0314507, 0314508. lease.

<sup>4</sup> The appeal decision of the Bureau in listing these statements has some errors which are corrected as set forth in this listing.

<sup>5</sup> See footnote 2, second paragraph, concerning this offer.

ARTHUR L. RANKIN

A-30568

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**Mineral Leasing Act: Generally—Mining Claims: Generally—Phosphate Leases and Permits: Permits—Applications and Entries: Priority**

A holder of a mining claim located after the enactment of the Mineral Leasing Act has no statutory or regulatory preference right to a phosphate prospecting permit simply because some phosphate is discovered on his claim; his application for a permit is therefore subordinate to an application for a permit filed prior to his.

**Mineral Leasing Act: Generally—Mining Claims: Lands Subject to**

Minerals such as phosphate which are subject to disposition under the Mineral Leasing Act of 1920 have not been subject to location under the mining laws since the enactment of that act; in order for any claimant locating a mining claim thereafter for minerals subject to the mining laws to have any rights to phosphate within his claim, his claim must be validated by a discovery of a valuable deposit of a mineral locatable under the mining laws prior to the time when the land is known to be valuable for a leasable mineral or an application for a permit or lease for a leasable mineral is filed.

**Mining Claims: Determination of Validity—Mining Claims: Discovery—Multiple Mineral Development Act: Generally—Surface Resources Act: Generally**

Because Congress expressly limited the effect of proceedings under the Surface Resources Act, a determination under that act that a mining claim is subject to the limitations and restrictions as to the surface resources of the claim provided in section 4 of the act because of a lack of a valid discovery on the claim does not invalidate his claim or operate as *res judicata* on the issue of discovery in the event of contest proceedings initiated by the United States or a proceeding brought under section 7 of the Multiple Mineral Development Act.

**Surface Resources Act: Generally—Phosphate Leases and Permits: Generally—Phosphate Leases and Permits: Permits**

Prospecting permits for phosphate may be allowed only for lands in any "unclaimed, undeveloped area"; therefore, they cannot be issued for lands

covered by mining claims which have been determined simply to be subject to the limitations and restrictions imposed by section 4 of the Surface Resources Act after a proceeding brought under that act.

**Mining Claims: Generally—Mineral Leasing Act: Lands Subject to—  
Phosphate Leases and Permits: Generally**

The holder of a valid mining claim located after February 25, 1920, cannot file and maintain an application for a phosphate prospecting permit for land in his claim unless he relinquishes his claim or files a waiver of his rights to Leasing Act minerals in the claim.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Arthur L. Rankin has appealed to the Secretary of the Interior from a decision by the Chief, Branch of Mineral Appeals, Office of Appeals and Hearings, Bureau of Land Management, dated October 5, 1965, affirming a Montana land office decision of May 27, 1965, dismissing a protest filed by him against the issuance of a phosphate prospecting permit to Kenneth Davis. Davis' permit application, Montana 069927, filed on March 29, 1965, is for the N $\frac{1}{2}$ NW $\frac{1}{4}$  sec. 17, T. 8 N., R. 11 W., Mont. Prin. Mer., in the Deer Lode National Forest. Rankin on May 4, 1965, with his protest, also filed his own phosphate prospecting permit application, Montana 070136, for the same land in sec. 17 "available for such permit."

In his protest Rankin asserted that two unpatented mining claims which he owns, the Morning Glory and Fortuna, lie within the boundaries of Davis' application. He stated that precious minerals, "gold and silver, have been found on both these claims, but not in paying quantities. Further development work is underway." He also asserted that "as discoverer of phosphate on these claims" he was entitled to a first claim to a permit and a preference as award for discovery.

In dismissing Rankin's protest the land office indicated that he had filed verified statements on June 2, 1958, claiming rights contrary to or in conflict with the limitations or restrictions provided for in section 4 of the Surface Resources Act of July 23, 1955, 69 Stat. 368, 30 U.S.C. § 612 (1964), which gives the right prior to issuance of patent to a mining claim to the United States to "manage and dispose of the vegetative surface resources" on the claim and "to manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States)." Rankin filed his verified statements after a proceeding was initiated by the United States Forest Service in accordance with section 5 of the act of July 23, 1955, 69 Stat. 369, as amended, 30 U.S.C. § 613 (1964), which provides a means by which determinations may be made as to whether unpatented mining claims are subject to the limitations as to surface use of the resources of the claims as provided in section 4 of that act. The land office pointed out that a hearing was held on April 6, 1962, as provided for

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by section 5 of the act, but that Rankin failed to appear and the hearing examiner by a decision dated June 4, 1962, which was not appealed, determined that a valuable discovery of minerals had not been made on the claims and that prior to patent the claims were subject to the limitations and restrictions of section 4 of the act of July 23, 1955. The land office also pointed out that under the Mineral Leasing Act of February 25, 1920, 41 Stat. 437, 30 U.S.C. § 181 *et. seq.* (1964), phosphate is a leasable mineral not locatable thereafter under the mining laws. It concluded that because Rankin's claims were not validated by a discovery prior to 1955, Rankin had no grounds for challenging Davis' right to a phosphate prospecting permit and that he had no basis for a preference right since under the Mineral Leasing Act preference rights are given only to permittees who discover a leasable mineral and Rankin had never held a valid prospecting permit. It also stated that it was irrelevant whether or not gold and silver had been found in paying quantities or otherwise on the claims since claims located for gold and silver cannot vest the claimant with any interest in or to phosphate found within the limits of the claim.

In affirming the land office, the Office of Appeals and Hearings appeared to agree with the conclusions in the land office decision. It pointed out that the Fortuna mining claim was located on July 23, 1928, and the Morning Glory claim on November 17, 1922, both as quartz lode mining claims. It stated that any discovery of phosphate by Rankin would have been made since the enactment of the Mineral Leasing Act, which precludes the appropriation of phosphate under the general mining laws. It stated that Rankin's assertion that phosphate had been found on the land was "vague, self-serving, and uncertain." It also rejected a contention by Rankin that an action in a State court had quieted title to the claims in himself and that the United States Forest Service has no jurisdiction over the surface of the claims, referring to the proceeding brought under the Surface Resources Act and stating that no action by a State court could affect any right of the United States to manage the surface rights to the land.

The appellant's position is somewhat unclear as to his basis for claiming rights to any phosphate in the mining claims.

He appears primarily to want first priority to a prospecting permit for phosphate within his mining claims. Yet, he also appears to rely on the alleged fact that he owns the mining claims, has done assessment work on them, and is continuing to work the claims, and that title to the claims was quieted in his name in a proceeding in a State court in 1945 prior to the passage of the 1955 act. He does not specifically contend that his claims have been perfected by a valid discovery of a mineral locatable at the time his claims were located, but states he lays "claim by right of discovery irrespective of location." He also states

that his "attitude \* \* \* re to [sic] surface rights and the appellant's discovery of the Phosphate are two unrelated matters [sic] and should be considered without prejudice."

The appellant cites no statutory or regulatory authority by which his asserted preference right should be recognized. As the Bureau decisions have pointed out, there is nothing in the Mineral Leasing Act by which a preference right may be recognized except to the holder of a prospecting permit who makes a discovery of a valuable deposit of phosphate within the area of his permit. Mineral Leasing Act, section 9, as amended, 74 Stat. 7 (1960), 30 U.S.C. § 211 (1964). The regulations provide that applications for prospecting permits will be considered with respect to priority in accordance with the time of filing such applications in the appropriate land office. 43 CFR 3161.3-1(c). There is no provision by which any other priority or preference is recognized. Thus, Rankin is not entitled to have his application for a permit considered in preference to Davis' unless he can show that Davis' application must be rejected for some deficiency which would not apply to his. He has not made such a showing and it does not appear that he can.

Section 9 of the Mineral Leasing Act, *supra*, authorizes the issuance of prospecting permits for phosphate only in "any unclaimed, undeveloped area." One question which must be resolved before any prospecting permit is issued here is whether the land applied for is an "unclaimed, undeveloped area." Obviously if the land is considered as claimed or developed within the meaning of section 9, no prospecting permit application can be allowed, either to Davis or the appellant or anyone else regardless of priorities of filing. In such event, the further question arises as to what rights, if any, the appellant has to any phosphate within his mining claims in view of the fact that phosphate is not locatable under the mining laws. These questions require a consideration of the law respecting conflicts between mining claims and Mineral Leasing Act applications, permits or leases.

It is established that the minerals which were, in effect, reserved under the Mineral Leasing Act of 1920 for disposal by permit or lease only could not thereafter be located under the mining laws, and that any mining claim located for another mineral but upon which there was known to be a leasable mineral at the time of location was invalid. *United States v. United States Borax Company*, 58 I.D. 426 (1943), rehearing denied, *id.* 440 (1944). If land was under a lease or permit or application therefor at the time a mining claim was located, the claim was held to be void because the lease or permit or application segregated the land from location under the mining laws and no hearing as to whether there was a discovery of a valuable mineral deposit on the mining claim was necessary. *Clear Gravel Enterprises, Inc.*,

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64 I.D. 210 (1957); *Joseph E. McClory et al.*, 50 L.D. 623 (1924); *Filtrol Company v. Brittan and Echart*, 51 L.D. 649 (1926). This was held to be so because of the rule that a patent issued for a mining claim would carry complete title to the land and everything it contained and would, if issued, necessarily defeat any rights to other mineral deposits. However, if such other mineral deposits were subject only to leasing under the Mineral Leasing Act, an irreconcilable conflict would be created. It could be solved by the mining claimant's consent to a reservation of the minerals leasable under the 1920 act, but there was no authority for such a reservation. Consequently, a mining claim for land within a mineral permit or application could not be valid. *Joseph E. McClory et al.*, *supra*; *Filtrol Company v. Brittan and Echart*, *supra*.

These rulings applied only to mining claims located after February 25, 1920, where, at the times of location, the lands in the claims were known to be valuable for a leasable mineral or were included in permits or leases for such minerals or applications for such permits or leases. Where, at the time of location, land in a claim was not known to be valuable for a leasable mineral and was not included in a permit or lease or application therefor, the mining claim, if valid, would carry the rights to all minerals even though leasable minerals were later found in the claim. Where a mining claim was located after February 25, 1920, but before a permit or lease was issued under the Mineral Leasing Act, the validity of the subsequently issued permit or lease dependent upon whether the mining claim had been perfected by a valid discovery at the time the application for the lease or permit was filed. *Marion F. Jensen et al.*, *Elden F. Keith et al.*, 63 I.D. 71 (1956); *Union Oil Company of California*, 65 I.D. 245 (1958).<sup>1</sup> An application under the Mineral Leasing Act must therefore be rejected if a prior mining claim is found to be valid. *Id.*; *Union Oil Company of California v. Western Drilling and Producing Co. et al.*, A-27588 (July 14, 1958). The reason for this rule is that a mining claimant who has established a possessory right to the land before the application is filed is considered to have the full equitable title to the land, and the United States has no mineral interest in the land which it can lease or issue a permit for, including the minerals leasable under the Mineral Leasing Act.

These cases thus recognized that there could be no separation of the leaseable mineral estate from the remaining estate in a mining claim, and that although there could be either a valid permit or lease under the Mineral Leasing Act or a valid mining claim for the same land, there could not be both. If there was a conflict between a lease or permit and a mining claim located prior to the issuance of the permit

<sup>1</sup> Affirmed in *Union Oil Company of California v. Udall*, 289 F. 2d 790 (D.C. Cir. 1961).

or lease under the Mineral Leasing Act, the Department took the position that the mining claimant must contest the permit or lease in order to assert his rights under the claim. *Union Oil Company of California, supra*.

Problems caused by such conflicts and the availability of land for lease or permit under the Mineral Leasing Act or for location under the mining laws for other minerals led to the enactment of the Multiple Mineral Development Act of August 13, 1954, 68 Stat. 708, as amended, 30 U.S.C. § 521-531 (1964).<sup>2</sup> The purpose of this act was to resolve conflicts between claimants under the mining laws and those under the Mineral Leasing Act and to enable development of lands covered by leases or permits for minerals still locatable under the mining laws.

The Bureau decisions did not mention the Multiple Mineral Development Act, apparently because they concluded that a determination under section 5 of the Surface Resources Act of 1955, *supra*, that there was no discovery on the appellant's claims and that the claims were subject to the limitations and restrictions of section 4 of that act precluded the mining claimant from thereafter asserting any rights to minerals leasable under the Mineral Leasing Act. The accuracy of this assumption must be examined.

In considering the effect of sections 4 and 5 of the Surface Resources Act, the Congressional purpose is manifest that the proceedings contemplated only a determination as to the rights between the United States and the mining claimant as to the management and disposition of surface resources of a claim. It is true that a test for determining the rights to the surface resources under that act is whether or not there has been a valid discovery of a valuable mineral deposit within the meaning of the mining laws. See *United States v. Clarence E. Payne*, 68 I.D. 250 (1961). It has also been held that a proceeding under section 5 of the Surface Resources Act is unnecessary in order to subject a claim to the limitations of section 4 of the act, where the United States has already contested the validity of the claim and found that a valid discovery has not been made. *United States v. Carlile*, 67 I.D. 417, 427 (1960). In that case it was also held that it did not matter whether or not the contest was brought as the result of an application for a mineral patent or in the absence of such an application, and that upon the finding that there was no valid discovery the claim is null and void.

However, Congress limited the effect of a proceeding brought under section 5 of the Surface Resources Act by providing in section 7 that nothing in the act:

<sup>2</sup> An interim act was enacted on August 12, 1953, 67 Stat. 539.

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\* \* \* shall be construed in any manner to limit or restrict or to authorize the limitation or restriction of any existing rights of any claimant under any valid mining claim heretofore located, except as such rights may be limited or restricted as a result of a proceeding pursuant to section 5 of this Act, or as a result of a waiver and relinquishment pursuant to section 6 of this Act; and nothing in this Act shall be construed in any manner to authorize inclusion in any patent hereafter issued under the mining laws of the United States for any mining claim heretofore or hereafter located, of any reservation, limitation, or restriction not otherwise authorized by law, or to limit or repeal any existing authority to include any reservation, limitation, or restriction in any such patent, or to limit or restrict any use of the lands covered by any patented or unpatented mining claim by the United States, its lessees, permittees, and licensees which is otherwise authorized by law. 69 Stat. 372, 30 U.S.C. § 615 (1964).

Therefore, in effect, even after a proceeding held under section 5 of the Surface Resources Act, a mining claimant can proceed to develop his claim and is entitled to all subsurface rights that he had in the absence of such a proceeding and to the use of the surface to the extent necessary to conduct his mining operations. The only effect of such a proceeding is the limitation *prior* to patent as to the management and disposition of surface resources and management of other surface resources.

In attempting to resolve the problems of conflicts between the mining laws and the mineral leasing laws, it was provided in section 5 of the Multiple Mineral Development Act that thereafter, subject to the conditions imposed by the act, mining claims could be located on lands included in mineral leasing permits or leases or applications therefor, or on lands known to be valuable for minerals subject to disposition under the mineral leasing laws, to the same extent in all respects as if such lands were not so included. 68 Stat. 710, 30 U.S.C. § 525 (1964). Section 4 of the act, 68 Stat. 710, 30 U.S.C. § 524 (1964), provided that mining claims or millsites located after July 31, 1939, and before February 10, 1954, and validated under sections 1, 2 and 3 of the act, or located after August 13, 1954,

\* \* \* shall be subject, prior to issuance of a patent therefor, to a reservation to the United States of all Leasing Act minerals and of the right (as limited in section 6 hereof) of the United States, its lessees, permittees, and licensees to enter upon the land covered by such mining claim or millsite and to prospect for, drill for, mine, treat, store, transport, and remove Leasing Act minerals and to use so much of the surface and subsurface of such mining claim or millsite as may be necessary for such purposes, and whenever reasonably necessary, for the purpose of prospecting for, drilling for, mining, treating, storing, transporting, and removing Leasing Act minerals on and from other lands; and any patent issued for any such mining claim or millsite shall contain such reservation as to, but only as to, such lands covered thereby which at the time of the issuance of such patent were—

- (a) included in a permit or lease issued under the mineral leasing laws; or
- (b) covered by an application or offer for a permit or lease filed under the mineral leasing laws; or



(c) known to be valuable for minerals subject to disposition under the mineral leasing laws.

Under section 8 of the act, 68 Stat. 715, 30 U.S.C. § 528 (1964), the owner or owners of any mining claim located prior to the act may, at any time prior to issuance of patent therefor, "waive and relinquish all rights thereunder to Leasing Act minerals." The execution of such waiver and recordation in the office where the notice of certification of location of the claim is of record "shall render such mining claim thereafter subject to the reservation" provided in section 4.

To determine whether leasable minerals in mining claims located before the date of the act could be disposed of under the mineral leasing laws, section 7 of the act, 68 Stat. 711, as amended, 30 U.S.C. § 527 (1964), set up a detailed procedure. Basically it allows any applicant, permittee or lessee under the mineral leasing laws who has for a period of at least 90 days filed a notice of his application, permit or lease in a county recorder's office, to file a request with the land office for publication of a notice of his application, permit or lease. The manager of the land office will cause the notice to be published, describing the lands and giving notice that if any person claiming or asserting any right or interest in Leasing Act minerals by virtue of any unpatented mining claim located prior to the act shall fail to file in the office where the request for publication was filed, within 150 days from the date of the first publication of the notice, a verified statement setting forth the mining claim and certain information, such failure shall be conclusively deemed to constitute a waiver and relinquishment by such claimant of any and all right, title, and interest under such mining claim, *but only as to the leasable minerals*, and to constitute a consent that any patent issued therefor shall be subject to a reservation of the Leasing Act minerals and thereafter preclude any assertion by such mining claimant of any right or title to or interest in any Leasing Act mineral by reason of the claim. If a verified statement is filed, then a hearing is to be held to determine the validity and effectiveness of the mining claimant's asserted right or interest in the Leasing Act minerals. However, the parties may enter into stipulations as to whether a hearing should be held and the effect of the rights asserted under the verified statement. If a hearing is held and it is determined that the mining claimant has a right by virtue of the validity of the claim as to the Leasing Act minerals, then no subsequent proceedings under section 7 of that act shall have any force or effect upon the mining claimant's asserted right or interest.

It can be seen that proceedings under both the Multiple Mineral Development Act and the Surface Resources Act were contemplated by Congress to meet and resolve specific problems. Under both acts there is a provision by which the mining claimant may waive or relinquish his rights to the extent that his claim will be subject to the par-

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ticular limitations or restrictions provided by the act. It is apparent from the statutory scheme of both acts that a determination of rights under one act was not supposed to affect a determination of rights under any other act. Since the Multiple Mineral Development Act is the only act of general applicability which authorizes, in effect, a split or division in the mineral estate of the lands, without some determination under that act as to a mining claimant's rights to leasable minerals or his waiver or relinquishment of rights to them, there is no authority for recognizing any splitting of the mineral estate in a mining claim.

It is true that if a mining claim is contested as to its validity by the United States, or if a hearing as to that claim is held under either the Surface Resources Act or the Multiple Mineral Development Act to determine the mining claimant's rights under those acts, exactly the same issue may be involved, e.g., whether or not there has been a valid discovery. In the case here the Bureau apparently considered a finding of a lack of discovery in a proceeding under the Surface Resources Act to be conclusive of the rights of Rankin so far as the Multiple Mineral Development Act is concerned. However, as has already been discussed, Congress in the Surface Resources Act and the Multiple Mineral Development Act specifically limited the effect of the proceedings under each act to the specific limitations prescribed in each act. Because of this, we cannot agree with the Bureau that a finding under either of those two acts is *res judicata* as to the same issue under the other act. Of course, as has already been pointed out, if the validity of a claim has been challenged in a contest brought under the Secretary's general authority to determine the validity of mining claims, the determination that the claim is invalid because of a lack of discovery is conclusive in all respects. *United States v. Carlile, supra.*

We must conclude, therefore, that the Bureau erred insofar as it assumed and held that the finding of a lack of discovery in proceedings under section 5 of the Surface Resources Act precludes a mining claimant from asserting rights to leasable minerals, or otherwise subjects the claim to restrictions or limitations not specifically provided for by that act. This conclusion, however, does not mean that the proceedings under that act must be ignored or discounted. The record established at such a hearing becomes part of the official records of this Department. Therefore, it may well serve to provide a basis for further action against a claim, and, in any subsequent hearing, the transcript of testimony and exhibits, with the decision may be introduced as evidence of the facts to be proved. Of course, evidence to rebut such evidence would have to be considered if presented at the subsequent hearing.

We should point out that there is nothing in the Multiple Mineral Development Act or the Surface Resources Act which, apart from the

limitations as to the effect of proceedings under each act, limits or otherwise affects the inherent power and duty of the Secretary of Interior to determine whether a mining claim is valid. The only limitation upon this power is that adequate notice of the charges against the claim must be given to the mining claimant before the facts may be conclusively determined and a claim may be declared null and void and canceled. *Cameron v. United States*, 252 U.S. 450 (1920); *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334 (1963). Thus, it has been held that the Secretary has authority to initiate contests against mining claims even though no patent applications have been filed and no apparent public need for the land has been shown. *Davis v. Nelson*, 329 F. 2d 840 (9th Cir. 1964). Such action may be deemed advisable in certain circumstances to avoid the possibility of a multiplicity of proceedings involving a claim.

The fact is that up to now a contest has not been initiated against appellant's claims under the Secretary's general authority to determine the validity of mining claims. The only proceeding that has been brought has been the one under the Surface Resources Act which, as we have just seen, has not impaired the validity of the claims but has only given the United States the right to manage and dispose of the surface resources of the claims. So far as this case is concerned, the claims must be regarded as outstanding *prima facie* valid claims. Consequently, so long as this status of the claims continues, the lands embraced in them cannot be considered as "unclaimed" lands for which phosphate prospecting permits may be issued. Therefore, neither Rankin's nor Davis' application can be allowed for these lands.

There remains then the question as to whether Rankin has any right to the phosphate in the claims by virtue of his title to the claims. The answer must be that if the land in the claims was subject to mining location when the claims were located (*e.g.*, if it was not known to be valuable for a leasable mineral at the time) and if no further proceeding is brought to invalidate the claims or to subject them to multiple mineral development under the act of August 13, 1954, *supra*, he cannot be prevented from prospecting for, developing, and producing the phosphate.<sup>3</sup>

In this state of affairs, appellant is in an incongruous position in asserting rights to the phosphate under the Mineral Leasing Act and also apparently under the mining laws.

<sup>3</sup> In asserting his right to the phosphate within his claims, appellant relied on a Montana State court proceeding quieting title to the claims in his name. The Bureau was correct in pointing out that such a proceeding in a State court has no effect with respect to the interests in the land as between the United States and a mining claimant. A determination as to the validity of a mining claim in such a case is initially with this Department, with appropriate review in the Federal courts. *Cameron v. United States*, *supra*; *Best v. Humboldt Placer Mining Co.*, *supra*; *Davis v. Nelson*, *supra*; *Monolith Portland Cement Company v. Gillebergh*, 277 P. 2d 30 (Cal. Dist. Ct. App. 1954).

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He cannot be permitted to assert and request rights to the phosphate within his mining claims under both the mining laws and the Mineral Leasing Act. If he wishes to retain his prospecting permit application with its apparent priority second to that of Davis' application, he may relinquish all rights under his conflicting mining claims. If he does not wish to extinguish his claims, he may retain his prospecting permit application and also his interest in the conflicting mining claims as to minerals other than the leasable minerals by executing and acknowledging a waiver and relinquishment of all rights to Leasing Act minerals, with the recordation thereof in the office where the mining claim is recorded, in accordance with section 8 of the Multiple Mineral Development Act, *supra*. If he does this, his permit application would still be subordinate to Davis'. If the appellant wishes to assert his rights to the leasable minerals upon the basis of his mining claim, he should withdraw his prospecting permit application, since his assertion that the land is "claimed" under the mining laws is inconsistent with his application under the Mineral Leasing Act for deposits or land that is "unclaimed." If the appellant takes no further action, his permit application will have to be rejected as being for land which is not "unclaimed."

These are the courses of action open to appellant if no action is taken by Davis or by the United States to challenge the validity of his claims. Davis, as an applicant for a mineral leasing permit, has the right to institute proceedings for a determination as to the mining claimant's interest in the leasable minerals under section 7 of the Multiple Mineral Development Act, *supra*. And, of course, the United States, under the Secretary's general authority to determine the validity of mining claims, may institute a contest against the claims if there appear to be grounds for challenging the validity of the claims. In this connection, the Bureau of Land Management, in conjunction with the Forest Service, would appear to have a duty to review the proceeding that was brought against the claims under the Surface Resources Act to determine whether, in view of the evidence elicited in that proceeding and other evidence that may be available as of the critical dates when validity of the claims must have been established,<sup>4</sup> a contest should not now be brought by the United States against the claims.

To conclude, insofar as the Bureau decisions held that the appellant's protest should be dismissed because he has no preference right to a

<sup>4</sup> If at the time of the Surface Resources Act proceeding the claims were in fact invalid because of lack of a discovery, the claims could subsequently have been validated by discoveries, but the discoveries would have had to be made before the occurrence of some other event which would have removed the lands from mining location. For example, if before discovery the lands became known to be valuable for phosphate or any other leasable mineral or an application for a lease or permit for such mineral was filed or the lands were withdrawn, the claims could no longer have been perfected by discovery.

phosphate prospecting permit under the Mineral Leasing Act, they are correct. However, insofar as the decisions may be considered as ruling that the appellant could not protest against the issuance of permit to another because of any rights he might have under his conflicting mining claims, they are incorrect to the extent discussed above.

Accordingly, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decisions appealed from are set aside, and the case is remanded to the Bureau for further action consistent with this decision.

ERNEST F. HOM,  
*Assistant Solicitor.*

### APPEAL OF DESERT SUN ENGINEERING CORPORATION

IBCA-470-12-64

*Decided October 25, 1966*

#### Contracts: Disputes and Remedies: Equitable Adjustments—Contracts: Construction and Operation: Changes and Extras

Where the area over which survey work is to be performed is changed after award of a contract to a surveying firm, the increased amount to be paid because the new route is rougher and more inaccessible should be determined principally on the basis of the rule of reasonable value; however, this does not prevent consideration of the costs that reasonably could have been incurred on the changed work area by the contractor selected for the job by the Government.

#### Contracts: Construction and Operation: Intent of Parties—Contracts: Disputes and Remedies: Damages: Liquidated Damages

Liquidated damages were assessed under contract clauses which established a completion date for an intermediate stage of survey work plus a liquidated damages provision applicable to the intermediate stage. A separate liquidated damages schedule was applicable to a completion date established for one of the contract's final stages, that completion date originally falling 135 days later than the date fixed for the intermediate stage. In circumstances where the original 135-day period had been substantially lengthened due to the issuance of time extensions of unequal length for the two stages, it was found that there was not a sufficient showing that actual damages would be suffered by the Government beyond the originally established 135-day period to justify enforcement of the liquidated damages clause applicable to the intermediate stage clause for more than that period; therefore, the Board enforced the liquidated damages provision only for 135 days as a reasonable measure of the loss to the Government resulting from non-availability of the intermediate work.

### BOARD OF CONTRACT APPEALS

The claims to be considered in this appeal are (1) for payment of additional compensation in the amount of \$163,634.11, and (2) for the

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release of the sum of \$46,400 withheld by the contracting officer under a liquidated damages clause. The contract provided for surveys and engineering work necessary for the Flagstaff-Pinnacle Peak 345-KV transmission line. It was awarded as the result of negotiations between representatives of Desert Sun Engineering Corporation (the appellant) and the Bureau of Reclamation, and is dated October 9, 1961. The appeal is from determinations made in findings dated November 5, 1964, and is timely. A hearing on the disputes involved in this case was held in December 1965. At that time the hearing official viewed from an airplane the greatest part of each of three routes of survey between a point near Phoenix, Arizona, and a point near Flagstaff. These routes are from 115 miles to 130 miles in length and figure prominently in the Desert Sun Appeal.

Clause 3 of the contract contains a statement that Desert Sun was awarded the contract on the basis of its engineering and professional knowledge. Included in Clause 4 was the following time schedule for contract work:

	Calendar days
Prints of aerial photography-----	30
Punch cards for profile, key maps and plan and profile-----	105
Ownership map and communications map-----	60
Staking centers of towers and determining leg extensions after plan and profile sheets with structure locations furnished to the contractor----	240
Right-of-way plats and descriptions-----	180
Drilling for foundation exploration-----	240

A portion of Clause 7, "Changes," provides:

The Contracting Officer may at any time, by a written order, and without notice to the sureties, make changes in the conditions of performance of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. \* \* \*

### *The Change in Alignment*

The testimony and supporting documents submitted by the Government at the hearing provide complete support for the contracting officer's findings concerning (1) the originally proposed alignment, (2) the alignment that by agreement of the parties was to be followed as of the time of contract award, and (3) the alignment upon which the performance of the work under the contract actually took place. The testimony of Curtis Tyler and Ralph Brendle, employees of the Government who served on the Board of Negotiation that recommended award of the survey job to Desert Sun, stands un rebutted in the appeal record. Only unsupported assertions of the appellant's

counsel take issue with the following findings concerning the alignments:

Route A was the originally proposed alinement. At the time of the first meeting with representatives of Desert Sun on September 19, 1961, it was not certain whether that alinement would be used. An alternate alinement, Route B, was proposed which was also shown on the maps given to Desert Sun. They were advised that a decision on which alinement would be used would be made shortly. The decision to use Route B was made prior to September 29, 1961, and Route B was the alinement considered in the discussions at the second negotiating conference which was on September 29, 1961, at which time the contractor submitted his proposal for performing the work under this contract. Route B was the alinement that was to be followed at the time of award of contract on October 9, 1961.

By letter dated October 27, 1961, copy attached and marked Exhibit 4, the contracting officer's representative furnished to the contractor prints of Drawings No. 864-423-951, -953, -954, and -955 and directed him to perform all work under this contract on the alinement shown on these drawings. This alinement is shown as Route C on Exhibit 3 and is the alinement followed in performing the work under the contract. The contractor acknowledged receipt of the above directive and the drawings on October 30, 1961. It should be noted that Route B and Route C follow the same alinement from Winona to Point "X". Accordingly, in this findings, the contractor's claims for compensation and extension of contract time relating to roughness of terrain and accessibility of the line will be limited to the alinement from Point "X" southward to the Pinnacle Peak Substation.

The Board concludes that the above findings are correct. In so far as this appeal is concerned the most important facts contained in those findings are (1) that Route B was the alignment agreed upon at the time of contract award, and (2) that after the award the contracting officer's authorized representative directed a change from Route B to Route C. Therefore, we must reject the contention stated in the appellant's post-hearing memorandum (page 1) that appellant negotiated for Alignment [route] A and "is entitled to a roughness factor over the entire Alignment [route] C using Alignment A as the gauge therefor."

Route B and Route C are in the same location for approximately 40% of the transmission line survey, on the Flagstaff (northern) end. Thus the change made in latter October 1961, when the Government provided the contractor with drawings showing Route C did not revise all of the originally agreed upon alignment. The revision was in the southern portion of the area to be surveyed, from Point "X" at Station 2840+00 down to the Pinnacle Peak Substation, near Phoenix. Route B was the longer of the two alignments, since at Point "X" it ran off to the west in a relatively circuitous fashion. Route C came much closer to being a straight line—it was about 20 miles shorter—but passed over rougher and less accessible terrain than that crossed by Route B.

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*Deficient Survey Work by Desert Sun*

Very serious disruptions to operations of the Government (and of the appellant's subcontractor, the American Engineering Company) resulted from inaccurate work on the part of the Desert Sun survey forces. Most of the defective work was performed in the period between October 27, 1961, and the end of the following summer. Only one conclusion can be drawn from the appeal record.<sup>1</sup> Much of the plan and profile and alignment work accomplished by the appellant on its first try could not be relied upon and did not constitute acceptable surveying. The Government counsel points out correctly that Desert Sun never wrote to the Government to object to the numerous corrections required by the contracting officer's authorized representative. Representatives of the American Engineering Company, the subcontractor that took over the work in the fall of 1962, acknowledged that the errors existed and that this required a great deal of resurvey work. (Tr. 312, 396-397.) Much of the work performed by Desert Sun's own forces was virtually useless to the Government prior to the time that it was corrected or redone.

The burden of the resurveying or correction work fell principally upon the American Engineering Company, which in the fall of 1962 played an increasingly active role in contract performance. American Engineering usually is referred to in the record as Desert Sun's subcontractor, but sometimes is called an assignee. At any rate, it was American Engineering, not Desert Sun, that, in the words of appellant's counsel, "ended up redoing the entire job" (Tr. 13).

The Government counsel in his post-hearing brief observes that it is "interesting and obvious" that there is an absence in the record of testimony as to what representatives of Desert Sun did or said, and points to "American Engineering as the real party in interest in this appeal." These developments are not particularly surprising. Desert Sun, because of its inability to produce acceptable finished survey work on Alignment C, and apparently because of financial difficulties, faded out of the picture, except for its management forces, in the latter half of 1962. American Engineering spent a great deal of time and money in the completion of the project, and understandably is vitally interested in any equitable adjustments in time or money that may be due under the contract.

*The Equitable Adjustment for the Change in Alignment*

The Government acknowledges that an equitable adjustment should be made because of the change from Route B, the alignment bid upon

<sup>1</sup> Exhibits 11a through 11f show the nature and seriousness of the great number of errors in the Desert Sun plan and profile and alignment work.



by the appellant, to Route C. Earlier in this opinion we have concluded that Route B should be considered as the base for determination of the adjustment. Routes B and C are identical north of Point "X."

From experience in the survey of other transmission lines, the Bureau of Reclamation has developed a cost and time comparison for performing surveys based on the roughness and accessibility of a line. Six classes of roughness and accessibility, with assigned symbols, and applicable comparative factors, are listed on page 6 of the contracting officer's findings dated November 5, 1964, as follows:

*Roughness and Accessibility Comparison*

<i>Symbol</i>		<i>Factor</i>
A-----	Average-----	1.0
B-----	Minor Roughness-----	1.5
C-----	Moderately Rough-----	2.0
D-----	Moderately Rough but with more difficult accessibility--	2.5
E-----	Rough with poor accessibility-----	3.0
F-----	Very rough and very poor accessibility-----	4.5

Also included on page 6 of the same findings is the following tabulation of roughness and accessibility factors for each portion of Routes B and C south of Point "X":

<i>Degree of roughness and accessibility</i>	<i>Route B</i>	<i>Route C</i>
A-----	60.6 miles	19.2 miles
B-----	15.8 miles	6.6 miles
C-----	2.1 miles	8.8 miles
D-----	0	9.5 miles
E-----	7.2 miles	14.2 miles
F-----	0	7.5 miles
	85.7 miles	65.8 miles

From the information above, the contracting officer determined that the average roughness factor for the changed portion of the transmission line survey was 1.28 for Route B and 2.23 for Route C. He calculated therefore, that "the comparison of roughness and accessibility of Route C over Route B is 1.74 (2.23/1.28) or a 74 percent increase."

The Government's determination of a 2.23 average roughness factor for Route C (south of Point X) is higher than the 2.03 "Average Roughness Factor" for the same area shown in the appellant's claim letter dated August 13, 1964.<sup>2</sup>

The Government counsel pointed out in his post-hearing brief:

It is most important to observe that the figures presented by both parties [relating to an equitable monetary adjustment for the change in alignment]

<sup>2</sup>The claim letter is attached as Exhibit 2 to the contracting officer's findings of fact dated November 5, 1964.

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are essentially estimates. Mr. Hammock [a witness for the appellant] stated that his figures \* \* \* were estimated on the basis of his knowledge of the conditions and did not reflect any business records of the contractor. The basis for the Government's figures was testified to in detail by Mr. Burdg [the contracting officer's authorized representative] who said they were obtained from Bureau of Reclamation survey activities on approximately 650 miles of transmission lines in the Colorado River Storage Project area and actual cost records thereof. \* \* \*

Appellant's counsel has called to our attention "that over ninety percent (90%) of Route 'B' had no more than average to moderately rough terrain. Whereas, on Route 'C' no less than forty-seven and one-half percent (47½%) of the terrain consisted of 'moderately rough' but with more difficult accessibility" to "very rough and very poor accessibility." This statement is included in the post-hearing memorandum filed by the appellant's counsel under the heading "Argument Supporting Extensions of Time for Inclement Weather." The Board's denial of the extension of time sought under Clause 9(c) of the contract, which authorizes such extensions for delays resulting from "unusually severe weather" will be discussed later in this opinion.

Three principal factors—increased roughness of terrain, poor access and inclement weather—undoubtedly slowed down the survey work on Route C south of Point "X." Desert Sun's equipment did not hold up in the rough and inaccessible areas. We have concluded that the question of the additional payment and time required because of the effect of those factors upon the changed portion of the work should receive its principal review under Clause 7, "Changes." That clause authorizes an increase or decrease in the "amount due" or "time required" when "changes in the conditions of performance" are made.

Desert Sun almost certainly would have had many problems of its own making on the job even if the change from Route B to Route C had not been made. Much of the survey work that required redoing was performed in areas that were not affected by the change, or in areas that, although they were substituted for the original areas, nonetheless were classified as relatively easy terrain ("Average" or "Minor Roughness").

The approach of the appellant's counsel to the matter of the equitable adjustment for the change in the area to be surveyed is summed up in his post-hearing memorandum:

The contractor approached the problem of adjustment in a practical manner, i.e., what was the additional cost to his pocketbook, and what additional time would be required to complete the project. \* \* \*

We feel that having been precluded from performing on the original alignment, the contractor should be allowed the additional time and actual cost to him as the only fair and equitable adjustment.

It is clear that the Government counsel is relying upon the objective or "reasonable value" technique<sup>3</sup> of determining the necessary equitable adjustment, and that appellant's counsel is urging the subjective or "cost to the contractor" procedure.<sup>4</sup>

The Board is of the view that application of the "reasonable value" technique will produce a just solution in most cases. However, this does not necessarily require use of the costs that would have been experienced by the most efficient producer. The matter may be judged from the standpoint of the costs that reasonably could have been incurred by the contractor having the responsibility for the project. The term "equitable adjustment" in itself precludes the idea of there being any one cut and dried method of arriving at the end desired.<sup>5</sup>

The appellant was underfinanced, ill-equipped and barely qualified to perform the survey work on Route B. The Government, in fairness, could not have expected Desert Sun to move into the rough, steep and inaccessible areas of Route C and perform on the basis of standard or theoretical costs. Desert Sun on the other hand has not supported with proved segregated costs or a convincing rationale its claim for additional compensation due as a result of the change in alignment. This claim originally was for \$85,448. A "Summation Schedule" attached to the appellant's post-hearing memorandum shows charges of \$98,739.48 for the "roughness factor" from Point "X" to Pinnacle Peak.

We find that in addition to the increase authorized by the contracting officer for the factors that he took into account, an allowance in Desert Sun's favor should have been made to provide for an essential

<sup>3</sup> The case for the "reasonable value" technique is made in Spector, *Confusion in the Concept of the Equitable Adjustment in Government Contracts*, 22 Fed. B.J. 5 (1962). Chairman Spector observes:

"There is a need for a rule in these equitable adjustment cases, and a preponderance of the evidence would appear to support a rule of reasonable value, or reasonable cost, rather than an actual cost-to-this-contractor technique. It is not suggested that actual costs are not to be considered in determining equitable adjustment. They are available in every case where a controversy has developed, and certainly have probative value. But they should be evidentiary, and not conclusive, and addressed as evidence to the issue of reasonable value."

<sup>4</sup> This procedure is supported in McBride, *Confusion in the Concept of Equitable Adjustments in Government Contracts: A Reply*, 22 Fed. B.J. 235 (1962). The article states:

"The principal objection to the objective approach is that it attempts to treat all contractors alike. While uniformity may be desirable, it is not always possible. No two contractors can have exactly the same cost experience under similar circumstances. One may be what is called a 'high cost producer' and another a 'low cost producer.' To treat them in the same way in pricing an equitable adjustment is to introduce an element of arbitrariness into the translation."

It should be noted that Mr. McBride's article emphasizes that the "Changes" clause under discussion in the article includes the language "If such changes cause an increase or decrease in the Contractor's cost of, or the time required for, performance of the contract, an equitable adjustment shall be made \* \* \*." (Italics supplied.) The corresponding language in the Desert Sun contract is "increase or decrease in the amount due under this contract, or in the time required for the performance." (Italics supplied.)

<sup>5</sup> John A. Quinn, Inc., IBCA-174 (November 29, 1960), 67 I.D. 430, 60-2 BCA par. 2851.

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short term augmentation of staff and equipment. The portion of the equitable adjustment providing for that augmentation reasonably should have been associated only with Desert Sun's work on Route C from a point approximately opposite Rover Peak,<sup>6</sup> north to a point about five miles south of Point "X." To accomplish this we increase the contracting officer's allowance of \$55,161.08 (Page 10 of the findings of November 5, 1964), to \$69,600. No justification is found for an increase beyond that amount for the claim items based on differences in roughness and accessibility between the various routes in issue, or on equipment "down time."

### *Requests for Extensions of Time*

An assessment of liquidated damages was made against the appellant for 232 days from October 28, 1962 to June 17, 1963. The assessment was for late delivery of the plan and profile drawings under Item 1-b, "Punch cards for profile, key maps and plan and profile." The contract allowed 105 days for completion of Item 1-b, the original completion date being listed as February 9, 1962. Government's exhibit 35 shows the total effect of a succession of Item 1-b time extensions. The extensions allowed by the contracting officer brought about a completion date "as extended" of October 28, 1962.

In addition to a full-scale and general attack on the liquidated damages provision covering Item 1-b, the appellant has requested extensions of time for stated delay causes, including the roughness and inaccessibility of the terrain on Route C, adverse weather, difficulties with the United States Forest Service, "vehicle down time," and the effect of assurances or promises said to have been given by the contracting officer's authorized representative. We will give first attention to the objections to the liquidated damages provision made on general grounds.

The appellant contends that there was substantial completion of the work called for in Item 1-b prior to June 17, 1963, and that the liquidated damages of \$200 per day for that item constitute a penalty. Delivery of accurate plan and profile drawings was a vital intermediate step in the work process.<sup>7</sup> Upon delivery of those drawings, the Bureau of Reclamation could locate or "spot" the supporting structures for the transmission line and calculate span lengths. In addition,

<sup>6</sup> Rover Peak is identified on Government's exhibit No. 19.

<sup>7</sup> The requirement for punch cards was deleted from the contract, and the key maps were delivered on time. The appellant's position that such deletion and delivery made the liquidated damages provision unenforceable cannot be upheld, due to the fact that the punch cards and key maps called for in Item 1-b were of minor importance compared to the plan and profile drawings included in the item.

the contractor charged with the responsibility of constructing the transmission line needed the plan and profile drawings as a control for its right-of-way clearing operations. A portion of Government's Exhibit 6 shows the pertinent sequence of work, and the respective duties of Desert Sun and the Bureau of Reclamation, as follows:

III. Office-----	Contractor---	Plan and profile drawings.
	Bureau-----	Structure spotting.
IV. Structure staking--	Contractor---	Field staking of each structure.
V. Structure checking--	Bureau-----	Field check of each structure site.
VI. Leg extension determination.	Contractor---	Field instrument survey to determine tower leg lengths.
VII. Structure summary	Bureau-----	Consolidation of all structure and leg extension quantities.

The survey and mapping work for a 345-KV transmission line is a small tail wagging a large dog, in that clearing and construction of a line cannot proceed until the essential survey and mapping activities are completed, but the cost of the clearing and construction is 25 to 35 times that of the survey and mapping.

The construction contract for the transmission line covered by the Desert Sun survey was awarded on June 22, 1962 (Government's exhibit 2f). Between that date and June 17, 1963, the construction contractor was in a position to perform a substantial amount of clearing and access road work.

All work originally incorporated in the Desert Sun contract was not completed on June 17, 1963. Nonetheless, that date has been treated by the parties as the completion date because of Order for Changes No. 4, dated July 16, 1963, and accepted by Desert Sun on August 17, 1963, which states in part:

1. Since the Desert Sun Engineering Corporation was unable to complete the correcting of errors to furnish data meeting the requirements of this contract, and since it was essential that correct data be obtained as soon as possible to avoid delaying the construction contractor, it was agreed that the Bureau of Reclamation would, at the close of business on June 17, 1963, take over and complete all remaining work to obtain correct data meeting the requirements of this contract.

The amount due under the contract was decreased by \$10,000 to reflect the deletion of work described in the paragraph quoted above.

The Board sustains the contract provision establishing \$200 per day as a reasonable approximation of the damages that could have been

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suffered by the Government as the result of untimely delivery of the plan and profile drawings. That amount, judged as of the date of the contract, bears a reasonable relation to the probable damage that would have followed from a delay in performance.<sup>8</sup> We also find that the appellant has not proved its allegation that Item 1-b was substantially completed prior to June 17, 1963.

One general question involving the assessed liquidated damages remains for review. The contract, as executed following the negotiations between the parties, provided for a 135-day period or "spread" between the delivery date for the plan and profile drawings (part of Item 1-b, originally due February 9, 1962), and the date for the completion of the work of staking tower centers and determining leg extensions for the towers (Item 1-d, originally due June 24, 1962). Because the actual completion dates for Item 1-b and Item 1-d occurred on the same day—June 17, 1963—the Government and the construction contractor were deprived of the 135-day period that had been built into the contract. However, that is not the entire story.

The contracting officer found that excusable causes of delay moved the scheduled completion date for the intermediate work item, Item 1-b, to October 28, 1962. He also ruled that Item 1-d, which was related to Item 1-b, was entitled to a *substantially longer* time extension.

Item 1-d received a longer time extension than did Item 1-b because the former item was affected by certain additional requirements imposed by the Government, and by delay on the part of the Government in furnishing needed data; however, those factors were found by the contracting officer to have not affected the appellant's ability to make progress on Item 1-b. Therefore, the completion dates ultimately came to be as follows:

Item 1-b-----	Plan and profile-----	Oct. 28, 1962.
Item 1-d-----	Staking tower centers and de- termining leg extensions.	Nov. 11, 1963.

It is to be seen that the time extensions granted by the contracting officer lengthened the agreed-upon period between the completion dates for the two items in question from 135 days to more than a year. This period, however, was reduced to 232 days by Order for Changes No. 4, which established June 17, 1963, as the actual completion for both items.

The 135-day period specified in the contract by the parties is the best indication available to the Board as to a reasonable amount of

<sup>8</sup> *Parker-Schram Company*, IBCA-96 (April 7, 1959), 66 I.D. 142, 59-2 BCA par. 2127.

advance or "lead" time needed between Item 1-b and Item 1-d. Clearly, there is a limit on the time required by the Government and its construction contractor for making good use of the plan and profile drawings at a time when the Item 1-d information is not available. Many of the harmful consequences from the standpoint of the Government and of the construction contractor, as outlined in the Government Counsel's post-hearing memorandum, will result from non-availability of the information called for in the later unit of work—Item 1-d—rather than that required in Item 1-b. This is because ordering the materials, and proceeding with most phases of construction of the transmission line is dependent upon completion of Item 1-d, for which no liquidated damages have been assessed.

An extreme example of the improper inclusion of a liquidated damages provision applicable to an intermediate stage of contract performance is discussed in *Schouten Construction Company*, FAACAP No. 65-20 (April 21, 1965), 65-1 BCA par. 4803. In that decision the provision, which was applicable to installation of a tower foundation and guy anchors, was held to be unenforceable. The Board found that, viewed as of the time of award of the contract, the Government "would not possibly suffer any actual damages from late performance of sub-schedule 2 B [tower foundation and guy anchors] so long as the work at each site on sub-schedule 2 B was completed in sufficient time to permit timely completion of the sub-schedule 2 C [tower] work." The Board also observed:

\*\*\* We do not \*\*\* suggest that a liquidated damages clause, more guardedly drafted than that here involved, which is tied into late performance of both an intermediate and the final stage would be unenforceable in all instances. \*\*\*

\*\*\* The point chosen in the present case for the assessment of liquidated damages under sub-schedule 2B substantially anticipated the point where harm reasonably could have been expected to occur. Such an assessment would, therefore, serve only as a penalty, not as compensation for legally cognizable harm. *Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 413 (1947).

This conclusion requires reversal of the decision of the Contracting Officer who is directed to make payment to the Contractor of all sums withheld as liquidated damages for late performance under sub-schedule 2 B of the contract.

The 135-day period between Item 1-b and Item 1-d was established by agreement of the parties and presumably as the result of the exercise of judgment on the part of the Government's engineers. The 232 period merely was the product of happenstance. The Board finds that assessment of liquidated damages beyond the 135-day period would amount to collection of a penalty; therefore, the contracting officer's assessment of such damages because of the late delivery of Item 1-b is sustained only to the extent of 135 days.

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*Requests for Extensions of Time Based upon Stated Causes*

If the original contract objective is to be carried out, the 97-day liquidated damages period held by the Board to be unenforceable should be treated as beginning on October 28, 1962 (the "as extended" completion date). Although the point may be arguable, we conclude that extensions of time for stated causes should be considered to run from the same date. The appeal record before us does not warrant an allowance of additional days of performance time for stated causes of delay. Under our analysis, such additional time up to a total of 97 days would fall concurrently with the unenforceable period.

The contracting officer in granting an extension of time for the changed (southern) portion of the surveyed area did not reduce the additional time found to have been necessary to compensate for the roughness and inaccessibility of terrain for two factors that, in our view, would have justified reductions. He did not take into account (1) the fact that the change did not affect all of the line (more than 40% of the area to be surveyed under the original order remained the same), or (2) that Route C was substantially shorter than Route B. The length of the line was reduced about 20 miles by the change. We have increased the amount due for the roughness and inaccessibility of the changed portion of Route C and for vehicle "down time." However, in view of the contracting officer's liberality in not making reductions for the two factors listed above, we conclude that his allowance of 70 days is an equitable adjustment even as applied to the increased amount.

Appellant's counsel has not keyed his request for an extension of time based on the occurrence of adverse weather to the "unusually severe standard that is included in Clause 9(c) of the contract; instead he points to the change that substituted a different type of terrain. We have considered that change elsewhere in this opinion. The Board will not deviate from its established holding that unusually severe weather does not mean any and all weather that hindered or prevented work under a contract.<sup>9</sup> The appeal record will not support a finding that a time extension should be allowed for unusually

<sup>9</sup> *Allied Contractors, Inc.*, IBCA-285 (September 26, 1962), 69 I.D. 147, 1962 BCA par. 3501. That decision observes: "We have consistently held that in order to establish a claim of unforeseeable and unusually severe weather it is necessary to present proof of the weather for the month or other period in question, not only as to the year in which the contract performance was affected, but for several past years, an acceptable total for establishing a pattern for comparison being 10 years."



severe weather beyond the one granted for that cause by the contracting officer.

Specific testimony and job records kept on a day-to-day basis are lacking for the time extension claim which rests on the contention that activities of the United States Forest Service caused undue delay on the job. Each of the survey routes considered by the parties to this dispute called for work over many miles of Forest Service lands (Government's Exhibit 20). The appellant has not proved that the Forest Service imposed unreasonable or improper requirements on the survey forces of Desert Sun or of its subcontractor, American Engineering Company.

The claim for a time extension based on statements that assertedly were made by the contracting officer's authorized representative will be considered under the next subheading.

*Claims Arising From Alleged Misrepresentation Or Concealment  
By A Government Representative*

In its claim documents, and by questions directed to the contracting officer's authorized representative at the hearing, the appellant has raised issues concerning actions allegedly taken by the authorized representative in the administration of the contract. No officer or employee of Desert Sun, the prime contractor, testified concerning the authorized representative's conduct. The charges of over reaching or concealment were leveled by officials of the subcontractor, American Engineering.

In the late summer of 1962, when the Government's rejections of Desert Sun's survey work were piling up, and the activities of Desert Sun on the project began to falter, American Engineering entered into the financing of the job. Prior to October 5, 1962, American Engineering had advanced about \$13,000 to Desert Sun to permit continuation of the work.

The authorized representative's participation in a meeting in Phoenix, Arizona, on October 5, 1962, brought about most of American Engineering's stricture. The authorized representative, Mr. Burdg, testified that the October 5 meeting was a "probing operation to find out how [the job] could be financed." (Tr. 145.) The question arose as to whether or not American Engineering would continue to finance the work and one of American Engineering's officials advised that the company was going to discontinue its assistance to the prime contractor. (Tr. 212.)

The first information given to American Engineering at the October 5 meeting concerning the amount of contract earnings remaining to be paid on the project apparently was not satisfactory to the sub-

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contractor. After American Engineering officials expressed their disappointment over the initial estimate, Mr. Stewart (of Desert Sun) and Mr. Burdg left the meeting room and used a calculator in another room of the Desert Sun headquarters. (Tr. 213.)

Mr. Burdg acknowledged that statements were made concerning the computations made on the calculator. He testified as follows:

Q. [There were statements] that there was an absolute minimum of \$35,000 left in the draw and that the job could be completed in six weeks, is that right, sir?

A. No, sir, that is not correct.

Q. Those statements were not made in your presence and at the meeting of October the 5th, 1962?

A. The manner in which you stated the question, it is not correct.

\* \* \* \* \*

Q. What was said and by whom?

A. The question was asked by Mr. Stewart and Mr. Larson [of American Engineering] as to how much money was left in the contract, and the reply was that on the basis of the Contractor's work which he had submitted which he claimed was correct, that so much money was available. It was based entirely on the assumption that the work that the contractor had submitted did meet the performance standards of the contract, and all statements made in that meeting and any other meeting which I attended with Desert Sun have always been prefaced upon that remark, as I recall. (Tr. 214-215.)

Mr. Larson testified that after their calculations were made, Mr. Stewart and Mr. Burdg "came back with a figure of around \$35,000 left in the job." (Tr. 382.) He also stated:

Q. Was that after the liquidated damages?

A. Well, they mentioned that this was what was left to be paid. Liquidated damages didn't enter into the picture; they wouldn't be assessed.

\* \* \* \* \*

A. They said we had about six weeks and it could be done in that time with the work we went over at this time. They showed us the bar chart and we went over what work had been done and accepted and what work was left to be done, plus the fact that they mentioned there was a voucher in for \$15,000 that should be paid within a matter of two weeks.

Q. Was Mr. Burdg present at the time this was all said?

A. Yes, he was.

Q. Did he say anything?

A. Yes, he did the talking. (Tr. 383.)

Mr. Burdg denied that he had informed American Engineering not to worry about liquidated damages, but agreed that he had said "that there was a \$15,000 invoice being processed for payment." (Tr. 25, 26.) He also acknowledged that he subsequently stopped payment on the \$15,000 invoice, but denied having an intention on October 5, 1962, to go back to his office in Salt Lake City to "put a stop order" on the invoice. (Tr. 27.)

The October 5, 1962 meeting was on a Friday. On Monday, October 8, 1962, Mr. Burdg wrote a letter bearing that date to Desert Sun. He did not send a copy of the letter to American Engineering. In that letter (Government's Exhibit 7) he rejected the invoices under which the \$15,000 was to have been paid, because the work covered by the invoices did not meet the requirements of the contract. He also included the following calculations:

Assumed earnings as per attached statement-----		\$120, 150
Less 10% retention-----		12, 015
		<hr/>
		\$108, 135
Less liquidated damages-----	\$3, 400	
	<hr/>	
	\$2, 400	\$5, 800
		<hr/>
		\$102, 335
Previous payments as of 7-2-62-----		\$117, 107
		<hr/>
Net amount owed by the company to the Government-----		\$14, 772

The October 8 letter informed Desert Sun that "no further payment will be made to the company until additional acceptable work has been submitted in the amount of approximately \$15,000." It also contained a \$150,700 estimate of the contract earnings that would be available "at time of revision of all plan and profile drawings." Some of the paragraphs on the second page of the October 8 letter are as follows:

It would appear that total contract earnings would be approximately \$159,500. Deducting previous payments and liquidated damages would indicate that anticipated contract earnings would approximate \$36,500.

\* \* \* \* \*

Additional invoices for payment under this contract will be accepted when plan and profile work for the entire line has been completed and leg extensions determined from Winona to the Coconino-Yavapai County Line.

This letter confirms my conversations with Messrs. Stewart and Brazieal [of Desert Sun] in your office on October 5, 1962.

The above analysis makes no provision for any additional liquidated damages which might be incurred in connection with this contract.

Government counsel asserts that Mr. Burdg's October 8, 1962 letter is the best evidence as to what was discussed on October 5. Without doubt it does confirm some of the statements made by Mr. Burdg at the October 5 meeting; however, the Board concludes that the letter contains a revision of the information about the status of payments, progress, and acceptability of work that was divulged by Mr. Burdg at the October 5 meeting. The evidence indicates that Mr. Burdg decided to reject the \$15,000 invoices sometime between October 5 and

*Decided October 25, 1966*

October 8. He conceded that he made additional calculations after he returned to Salt Lake City (Tr. 215, 216). The record does not disclose whether at that time he also conferred with Bureau employees who had been checking the survey work in the field for about two months. As a general matter, it was necessary for him to rely heavily on reports received from others, because he was in charge of approximately 20 survey projects at the time.

Mr. Larson of American Engineering saw the October 8 letter "a couple of weeks after it was written" (Tr. 391). Providing American Engineering with a copy of the letter at the time the original was transmitted to Desert Sun would have been a considerate, but not a required, action on Mr. Burdg's part. Desert Sun had the primary responsibility to inform its subcontractor (and financial "angel") of the word from the Government that Desert Sun had been overpaid by more than \$14,000.<sup>10</sup>

The appellant has also registered complaints about the activities of Mr. Burdg at meetings held on November 30, 1962, December 17, 1962 and June 5, 1963; however, the testimony of the appellant's witnesses does not indicate that he made unequivocal statements on those dates about the acceptability of Desert Sun's surveying or about liquidated damages.

To the extent that an appeal presents a claim for damages based on alleged misrepresentations, the Board has no jurisdiction.<sup>11</sup> We will not, therefore, pass upon American Engineering's contention that it is entitled to reimbursement for all funds expended by American Engineering on the project because of the alleged misrepresentation or concealment by the authorized representative of the contracting officer.

Performance of the Desert Sun survey work was in no way delayed as the result of statements made by Mr. Burdg at the meetings held in 1962 and 1963, and the appeal record will not support a ruling that a definite and binding agreement was made to eliminate all liquidated damages. Accordingly, all claims for additional time, or for additional compensation asserted under the contract, that are related to activities of the contracting officer's authorized representative, are denied.

<sup>10</sup> American Engineering's commitment to complete the project may have been made prior to the meeting of October 5, 1962. The agreement between Desert Sun and American Engineering in which the latter concern undertook to complete the survey "on a best efforts basis" (Government's Exhibit 8), is dated October 1, 1962.

<sup>11</sup> *Adler Construction Company*, IBCA-156 (January 4, 1960), 60-1 BCA par. 2513; *R. E. Lee Electric Co., Inc.*, ASBCA No. 10,800 (December 9, 1965), 65-2 BCA par. 5262.

*Adjustment for Section Corner Survey Work; Deduction  
for Damage to Forest Service Lands*

Paragraph 25 of the contracting officer's findings of November 5, 1964, determined that Desert Sun was entitled to payment for survey work performed and shown on certain drawings. The contractor's appeal document (Government's Exhibit 4) placed in issue the contracting officer's determination that \$171 per section corner for 17 section corners, a total of \$2,907, constituted an equitable adjustment for the section corner work. Because the appeal record is devoid of evidence that would support the appeal from that determination, the appeal is denied.

The appellant also failed to introduce evidence to support its position that the contracting officer erred in a ruling concerning erosion damage to Forest Service lands. The contracting officer found that two access roads constructed by Desert Sun were not properly treated, and that the contractor's negligence caused erosion damage to occur. A Government engineer testified at the hearing that the two roads had not been constructed in a workmanlike manner (Tr. p. 423). The contracting officer's deduction of \$287.50 is fully sustained by the evidence, and was properly made under Clause 3 of the contract, which states that the contractor is responsible for all damages to property that occur as a result of the contractor's fault or negligence in connection with the prosecution of the work. Therefore, the appeal is denied.

*Conclusion*

The appeal is sustained in part (1) by increasing to \$69,600 the \$55,161.08 determined to be an equitable adjustment by the contracting officer in Paragraph 28 of his November 5, 1964 findings, and (2) by eliminating 97 of the 232 days that were found in Paragraph 23 of the November 24, 1964 findings to be "late" under the liquidated damages provision applicable to Item 1-b.

All other claims involved in the appeal are denied.

DEAN F. RATZMAN, *Chairman.*

I CONCUR:

I CONCUR:

THOMAS M. DURSTON,  
*Deputy Chairman.*

WILLIAM F. MCGRAW, *Member.*

*July 28, 1966***TITLE TO LANDS WITHIN SAN CARLOS RESERVOIR SITE\*****Indian Lands: Generally**

The San Carlos Apache Indian Reservation, Arizona, is a congressionally unconfirmed executive order reserve in which the Indians have no compensable interest as against the United States. The United States did not have to look to the act of June 7, 1924 (43 Stat. 475), which authorized the construction of the San Carlos Irrigation Project for the benefit of the Indians of the Gila River Indian Reservation, Arizona, and others, for authority to acquire lands on the San Carlos Reservation needed for dam and reservoir purposes. As the United States already owned the lands free and clear of any legally cognizable obligation to the Indians, they could be and were devoted to the use of the Project by administrative act.

**Indian Lands: Rights-of-Way**

Additionally, the authority granted by the act of June 7, 1924, to acquire rights-of-way for the project would not have limited the Government to acquiring estates in the nature of flowage easements. Even if the United States had been forced to look to that Act for authority to acquire the lands in question it could have acquired fee simple estates in them.

**Indian Water and Power Resources: Irrigation Projects**

The lands of the San Carlos Dam and Reservoir are owned by the United States in connection with the San Carlos Irrigation Project. As a matter of grace the Indians were fully compensated for them when they were put to use in connection with the Project. Accordingly, under the act of April 4, 1938, 52 Stat. 193 (25 U.S.C. sec. 390), the proceeds derived from the granting of concessions and leases on the lands should be used for the operation and maintenance of the San Carlos Irrigation Project.

**M-36693***July 28, 1966***To: Secretary of the Interior.**

**SUBJECT: APPEAL OF SAN CARLOS APACHE TRIBE FROM THE COMMISSIONER OF INDIAN AFFAIRS' DECISION OF OCTOBER 26, 1965 CONCERNING TITLE TO THE SAN CARLOS RESERVOIR SITE AND THE DISPOSITION OF PROCEEDS FROM LEASES AND CONCESSIONS GRANTED THEREON.**

The Commissioner's decision from which an appeal has been taken by the San Carlos Apache Tribe holds that the shore and lands underlying the San Carlos Reservoir, Arizona, are owned by the United States in connection with the San Carlos Irrigation Project and that any proceeds derived from the leasing of or granting of concessions on such lands should be expended in the operation and maintenance of that Project as provided by the act of April 4, 1938, 52 Stat. 193; 25 U.S.C. sec. 390.

\*Not in chronological order.

Counsel for the Tribe contends that section 5 of the act of June 7, 1924, 43 Stat. 475, which authorized the construction of Coolidge Dam and the San Carlos Reservoir, constituted the entire authority of the Secretary to acquire lands, or interests therein, for use in connection with the San Carlos Irrigation Project; that the term "right-of-way" as used therein is synonymous with "easement;" that, since the lands of the San Carlos Apache Reservation used for Coolidge Dam and San Carlos Reservoir must have been taken or acquired under this section, the greatest estate that the United States can have therein is in the nature of a flowage easement; that the Tribe retains all interests in the lands not included in such easement; and that the Tribe, therefore, is entitled to any proceeds derived from the granting of concessions or leases on such lands.

Counsel apparently acknowledges that the Tribe was fully compensated for the more than 21,000 acres devoted to the use of the dam and reservoir. He argues that the fact and amount of compensation are irrelevant because the United States was authorized to acquire only an easement.

The act of April 4, 1938, *supra*, authorizes the Secretary of the Interior to grant concessions on and lease lands within the San Carlos Irrigation Project. Specifically, it provides:

That the Secretary of the Interior \* \* \* is \* \* \* authorized, in his discretion, to grant concessions on reservoir sites, reserves for canals or flowage areas, and other lands under his jurisdiction which have been withdrawn or otherwise acquired in connection with the San Carlos, Fort Hall, Flathead, and Duck Valley or Western Shoshone irrigation projects for the benefit in whole or in part of Indians, and to lease such lands for agricultural, grazing, or other purposes: \* \* \* *Provided further*, That such concessions may be granted on lands leased by the Secretary of the Interior under such rules, regulations, and laws as govern his administration of the public domain as far as applicable, for such considerations, monetary or otherwise, and for such periods of time as he may deem proper, the term of no concession to exceed a period of ten years: *Provided further*, That the funds derived from such concessions or leases, except funds so derived from Indian tribal property withdrawn for irrigation purposes and for which the tribe has not been compensated, shall be available for expenditure in accordance with the existing laws in the operation and maintenance of the irrigation projects with which they are connected. Any funds derived from reserves for which the tribe has not been compensated shall be deposited to the credit of the proper tribe. \* \* \*

Although we are convinced, for reasons later set forth, that the Tribe has no interest in the reservoir lands, we do not think that it is necessary to resolve this question in order to determine who is entitled to the proceeds from leases or concessions granted on the lands.

It seems clear that the lands used for Coolidge Dam and San Carlos Reservoir comprise a "reservoir site" and a "flowage area" and are "lands under [the] jurisdiction [of the Secretary of the Interior] which have been withdrawn or otherwise acquired in connection with

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the San Carlos \* \* \* irrigation project," within the meaning of 25 U.S.C. sec. 390. This being the case, and the San Carlos Apaches having been fully compensated for such lands, it is equally clear, under section 390, that funds derived from the leasing of and the granting of concessions on such lands should be expended for the benefit of the San Carlos Irrigation Project.

The San Carlos Apache Reservation as presently constituted contains lands which were originally set apart by the Executive Order of November 9, 1871, 1 Kappler 810-812, as the White Mountain Apache Reservation and lands which were set apart by the Executive Order of December 14, 1872, 1 Kappler 812-813, as the San Carlos addition to the White Mountain Reservation. It appears that all of the lands affected by the San Carlos Reservoir are part of those added to the reservation by the Executive Order of 1872. The reservation created by the Executive Orders of 1871 and 1872 was thereafter diminished by a series of executive orders and two acts of Congress. These executive orders were entered on August 5, 1873, July 21, 1874, April 27, 1876, January 26, 1877, March 31, 1877, and December 22, 1902. 1 Kappler 813-814 and 3 Kappler 671. Each of these orders restored parts of the reservation to the public domain. The act of February 20, 1893, 27 Stat. 469, 1 Kappler 467, also restored a part of the reservation to the public domain; provided that the proceeds realized from the disposition thereof should be expended for the benefit of the Indians of the reservation, and stipulated:

Sec. 5. That nothing herein contained shall be construed as recognizing title or ownership of said Indians to any part of said White Mountain Apache Indian Reservation, whether that hereby restored to the public domain or that still reserved by the Government for their use and occupancy.

Section 10 of the act of June 10, 1896, 29 Stat. 321, 358, 1 Kappler 597, 609, ratified an agreement which had been entered into on February 25, 1896, between the Apaches and an Indian inspector, by which the Indians ceded another part of the reservation to the United States for opening to mineral entry with the proceeds to be paid to the Indians. None of the executive orders which restored parts of the reservation to the public domain, including that of December 22, 1902, provided for the payment of compensation or other benefit to the Indians.

The conclusion is inescapable that the San Carlos Apache Indian Reservation is an unconfirmed executive order reserve in which the Indians have no compensable interest as against the United States. *Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942); *Healing v. Jones*, 174 F. Supp. 211, 216 (1959) and 210 F. Supp. 125 (1962). These cases recognize that although the Executive may withdraw and reserve lands of the United States for governmental purposes, the exclusive power to dispose of or to create compensable interests in the



territory or other property of the United States is vested in the Congress by section 3, Article IV of the Constitution. It is constitutionally impossible for the Executive by unilateral act to grant compensable interests in the territory of the United States. Since nothing in the history of the San Carlos Reservation indicates Congressional confirmation of title in the Indians—indeed, there is much to the contrary—we can only conclude that the Indians use and occupy the lands thereof at the pleasure of Congress and the President.

That this was the position of Congress and the Executive during the period that the San Carlos Irrigation Project was being considered and constructed is clear. As stated in Assistant Solicitor Soller's memorandum of January 22, 1965, the Project was conceived primarily for the benefit of the Pima Indians on the Gila River Indian Reservation. It was first considered in 1896. From that time until completion it was under more or less constant consideration by Congress and various agencies of the Executive. See House Report, Hearings before the Committee on Indian Affairs on the Condition of Various Tribes of Indians, 66th Cong. 1st sess., Vol. 2, p. 6. In 1912, Congress authorized the Army Engineers to investigate and report on the project. A Board of Engineer Officers was appointed for the purpose. Their report to the Secretary of War, dated February 25, 1914, and entitled, "San Carlos Irrigation Project, Arizona," is printed as House Document No. 791, 63d Cong., 2d sess. It contains a letter, dated October 28, 1913, to the Commissioner of Indian Affairs from A. L. Lawshe, who was superintendent of the San Carlos Apache Reservation, in which he expressed the view that the Indians should be compensated for the dam site. Addressing itself to this contention the Board stated:

Regarding land damages it is the understanding of the board that this reservation is not owned by the Apache Nation. If the United States owns it, and if this irrigation project were solely for the benefit of the Pima Indians and entirely at the expense of the Government, it would be idle to pay damages except on improvements belonging to the Indians, for the Government would only be transferring money from one pocket to another. But the project is also for the benefit of private lands that would receive a gift if the reservoir site be assessed at less than its value. Hence the project should pay for the land regardless of where the title lies.

The Board accepted as the value of the reservation lands required for the dam and reservoir the amount of \$91,865. *Op. cit.*, 145-146.

At the hearings on the bill which became the Act of June 7, 1924, 43 Stat. 475, which authorized the construction of Coolidge Dam and the San Carlos Reservoir, the following exchange took place between Wendell M. Reed, Chief Engineer of the Indian Irrigation Service, Representative Carl Hayden of Arizona, and Representative Homer P. Snyder, the Chairman of the House Committee on Indian Affairs:

Mr. Reed. \* \* \* The \$5,500,000 project which is referred to here really is simply for the dam and the necessary work in connection therewith.

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The *Chairman*. It does not contemplate the purchase of any land that may have to be purchased or contain the supply space for the reservoir?

Mr. *Reed*. Yes; the reservoir is all on an Indian Reservation—San Carlos Reservation.

The *Chairman*. So there is no expense in purchasing of land?

Mr. *Reed*. There will be some expense in the purchase or in payment for condemning buildings and some small works of that kind. The estimate made by the representatives of the Indian Service was practically \$200,000, and the Army Engineers, after investigating, concurred.

Mr. *Hayden*. That \$200,000 is included within the limit of \$5,500,000?

Mr. *Reed*. Yes.

Pima Indians and the San Carlos Irrigation Project, Hearings on S-966 Before the House Committee on Indian Affairs, 68th Cong., 1st Sess. (1924).

By letter dated May 5, 1925, to the Secretary of the Interior, the Assistant Commissioner of the Office of Indian Affairs, after quoting the conclusion of the Board of Engineer Officers set forth above and noting that twelve years had elapsed since the making of the Board's report, suggested that—

\* \* \* conditions make it necessary to have the matter again investigated with a view of determining the value of the lands and improvements that will be inundated by the water impounded by the reservoir.

\* \* \* \* \*

It is accordingly recommended that a Board of three members, consisting of the Assistant Chief Engineer, C. R. Olberg, the Superintendent of the San Carlos Reservation, James B. Kitch, and an Indian, a member of the San Carlos Reservation to be selected by the two other members, be appointed for the purpose of determining the extent of the damage to be suffered by reason of the construction of the Coolidge Dam, the third member of the Board not to pass on matters affecting Government buildings.

This recommendation was approved by Assistant Secretary John H. Edwards. An appraisal board, consisting of C. R. Olberg, J. B. Kitch and Morgan Toprock—the latter having been elected by the Indians of the San Carlos Reservation—was duly constituted and commenced its work. Its report, dated February 4, 1926, and approved by Assistant Secretary Edwards on November 27, 1926, shows beyond cavil that the Indians were awarded the full value of the approximately 21,750 acres of San Carlos Reservation lands devoted to the use of the Project. Its award of \$86,290.13 for "Tribal Indian Land" was constituted as follows:

Grazing land, 20,012½ acres @ 1.25 per acre.....	\$25,015.63
Land susceptible of irrigation, 1100 acres @ \$15.00 per acre.....	16,500.00
Irrigated and improved lands \$100.00 basic value. Deducting credits to individual Indians for improvements leaves 563½ acres at from \$72.25 to \$86.00 per acre.....	36,974.50
Agency farm lands, irrigated, tribal, 78 acres @ \$100.00 per acre.....	7,800.00
Total Appraisalment Tribal Lands.....	\$86,290.13

The legal and administrative histories of the San Carlos Apache Indian Reservation and the San Carlos Irrigation Project establish that it was never conceived that the United States had to acquire the lands needed for the dam and reservoir. It was always thought—and correctly—that the United States already owned the necessary lands and that it could devote them to the use of the Project simply by administrative act without incurring any obligation to the San Carlos Apache Tribe. Clearly the compensation which was paid the Tribe was awarded as a matter of grace and not of right (Cf. *Sioux Tribe of Indians v. United States*, *supra*, 331) and largely out of consideration of the fact that the Project was intended for the benefit of non-Indians as well as Indians.

The simple fact is that the lands of the Reservation devoted to the use of the Project were not acquired under the authority of the Act of June 7, 1924, and it is wholly immaterial what interests were comprehended by the term "right-of-way" used therein.

The construction of the Project did, of course, necessitate the acquisition by the Government of lands and rights from parties other than the San Carlos Apache Indians. For example, the Southern Pacific Railroad possessed a right of way over lands which were to be submerged by the reservoir. Ultimately, the Railroad was paid \$1,000,000 for this right of way and to defray part of the expense of relocating about 14 miles of its line.

Although we are convinced that the United States owned the reservoir area free and clear of any obligation to the Indians and did not require any additional authority to use it in connection with the Project, we could not, in any event, subscribe to the proposition that the use of the term "right-of-way" in the Act of June 7, 1924, limited the estate which the Government could acquire for the Project to a flowage easement. "Right-of-way" is as often used to describe an area of land as an estate in it. Cf. 64 I.D. 70 (1957). That Congress did not use the term in any restrictive sense is manifest by the fact that in appropriating for the Project in 1925 it provided that the sum appropriated "shall be available for purchase and acquiring of land and necessary rights-of-way needed in connection with the construction of the project." 43 Stat. 1141, 1152.

Even if we were to assume that the San Carlos Apaches had an interest in the reservoir lands enforceable against the United States and that we must look to the Act of 1924 for authority to use them in connection with the Project, we would conclude that, whatever the interest of the Indians, it has been fully compensated and extinguished.

All else that we have discovered tends to confirm this conclusion. Most of the lands of the dam site and reservoir area were included in Water Power Designation No. 4, executed on February 1, 1917, which

*November 1, 1966*

found them valuable for the development of water power, reserved them to the United States, and exempted them from the operation of any and all grants to the State of Arizona. In 1928, the Federal Power Commission reported to Congress that the San Carlos Apache Indians were not entitled to any additional compensation by reason of the generation of hydroelectric power at Coolidge Dam. This was based on the finding that the compensation already paid them exceeded the return to be expected if the lands were valued on the basis of combined irrigation and power development. Sen. Doc. No. 93, 70th Cong., 1st sess. 1928.

In sum, we are firm in the opinion that under 25 U.S.C. sec. 390, the proceeds derived from the leasing of and granting of concessions on lands in the San Carlos Reservoir area should be expended in the operation and maintenance of the San Carlos Irrigation Project. Without regard to "title," these lands have been withdrawn or otherwise acquired in connection with the Project and the San Carlos Apache Indians have been fully compensated for them. Present these facts, the statute directs that the proceeds from the lands be used for the benefit of the Project. Further, we are of the opinion that the San Carlos Apaches never had any interest in the lands enforceable against the United States; that the lands belonged to the United States free of any obligation; that no authority was needed for the United States to put them to any proper use, and that title to the lands is in the United States in connection with the San Carlos Irrigation Project.

FRANK J. BARRY,  
*Solicitor.*

THOMAS ORMACHEA AND MICHAEL P. CASEY

A-30599

*Decided November 1, 1966*

**Grazing Permits and Licenses: Generally—Grazing Permits and Licenses:  
Apportionment of Federal Range**

In a grazing district where land is base, a person who owns water rights is not entitled merely by reason of the ownership of such rights to grazing privileges on the land surrounding the waters in which the rights are claimed, and the allotment of such land to another user is not contrary to section 3 of the Taylor Grazing Act.

**Grazing Permits and Licenses: Appeals**

An appeal from a decision of a district grazing manager allotting the available Federal range in a grazing unit among the qualified users is properly dismissed where the allotment was based upon a range survey which showed that the allotment of each user contained sufficient forage to satisfy his Federal range demand and it is not shown that such an allotment does not, in fact, contain sufficient forage to satisfy the qualified demand or that the allotment of the unit was arbitrary or capricious.

**Grazing Permits and Licenses: Apportionment of Federal Range**

A permittee or licensee has no right to any particular area of the Federal range under the Taylor Grazing Act or the Federal Range Code and, although historical use is a factor to be considered in the determination of grazing privileges, the determination of the particular area in which the range user may exercise his grazing privileges is a matter committed to the discretion of the Department.

**Grazing Permits and Licenses: Apportionment of Federal Range**

It is not unreasonable or arbitrary to divide an area of the Federal range, formerly grazed in common, into allotments and to require fencing of the allotments when such action is found necessary to permit proper utilization of the range.

**Grazing Permits and Licenses: Hearings**

In a hearing to determine an appeal from a district range manager's decision in which the appellant alleges that he has been deprived of part of his grazing privileges, the burden is upon the appellant to show by substantial probative evidence that his rights have been impaired.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Thomas Ormachea and Michael P. Casey have separately appealed to the Secretary of the Interior from a decision dated January 27, 1966, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed a hearing examiner's decision dismissing their appeals from decisions of the manager of the Carson City Grazing District (Nevada No. 3) which divided the Fallon unit of the district into separate grazing allotments and designated the areas of use for each of the licensed users of the unit.<sup>1</sup>

By decisions dated April 17, 1964, the district manager divided the Fallon unit into 16 allotments and assigned the Federal range grazing use of the 14 licensees in the unit to the designated allotments and to an allotment in the adjacent Newlands unit.<sup>2</sup> The district manager's division of the unit into allotments was based on the carrying capacity or productivity of the range as determined by a range survey conducted in 1957 and 1958 and compiled and analyzed in 1959. Grazing use was assigned to the respective allottees so as to provide each licensee, according to the computation, with all of the forage to which he was entitled under the Taylor Grazing Act, 48 Stat. 1269 (1934), as amended, 43 U.S.C. §§ 315, 315a-315r (1964), and the grazing regulations, 43 CFR, Part 4110.

<sup>1</sup> It appears that appellant Casey failed to remit the filing fee of \$5, required with his notice of appeal, within the time limit prescribed by regulation (43 CFR 1844.2(b), 1853.7(c)). However, since the issues raised by both appellants are essentially the same, and a determination of the merits of one appeal would necessarily determine the rights of the other party, it is unnecessary to determine whether Casey's appeal should be dismissed for the procedural defect.

<sup>2</sup> Both appellants were given notice on February 20, 1964, of the proposed allocation of grazing privileges, and both protested their proposed allotments. The decisions of April 17, 1964, reflected some modification of the allotment boundaries proposed on February 20.

*November 1, 1966*

Ormachea's total Federal range demand was recognized as 14,105 animal-unit months, of which 9,944 AUM's were assigned to the Clan Alpine allotment, 161 AUM's to the Hole-in-the-Wall allotment, and 4,000 AUM's to the Labeau Flat allotment, a part of which is in the Newlands unit. Casey's Federal range demand was recognized as 4,296 AUM's, all of which were assigned to the Dixie Valley allotment. Additional grazing privileges of 1,320 AUM's, 1,520 AUM's, 83 AUM's and 250 AUM's were assigned to other licensees in the Clan Alpine, Dixie Valley, Hole-in-the-Wall and Labeau Flat allotments, respectively.

In dividing the unit into allotments the Bureau of Land Management proposed to construct fences where necessary, at Bureau expense, to separate the allotments and to drill additional wells to provide for more even distribution of livestock on the range. Maintenance of these facilities after their construction would be the responsibility of the licensees.

Prior to the district manager's decisions Ormachea grazed cattle and sheep in the areas now designated as the Cow Canyon, Dixie Valley and Bell Flat allotments, as well as the areas which he is now allotted. Casey grazed cattle in what is now designated as the Dixie Valley, Frenchman's Flat, Clan Alpine and Bell Flat allotments. The proposed allocation would deprive Ormachea of the use of the west slope of the Clan Alpine Mountains, where he obtained a portion of his summer grazing, and of the Bell Flat allotment, and it would reduce Casey's former area by about one half.

The appellants objected to the district manager's determination on the grounds that (1) it was arrived at in an improper and illegal fashion; (2) it is arbitrary and illegal in nature because it deprives appellants of their historic areas of use; (3) the manager failed to follow the required procedures in his determination; and (4) the determination deprives appellants of their vested stock water. Casey also objected to his allotment because it would require grazing in common with the sheep of the Ellison Ranching Company and because it would deprive him of an area of use which he claimed was purchased from Howard Turley.

At a hearing held at Carson City, Nevada, on January 20 and 21, 1965, pursuant to appeals by both Ormachea and Casey from the district manager's decisions, the hearing examiner found that the following issues were raised by the appeals:<sup>3</sup>

- (1) Whether the allotments were properly established;

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<sup>3</sup> Ellison Ranching Company, Joe Saval Estate, Magnuson Ranches (John C. Carpenter), Walter W. Whitaker, Edward H. Stark, Sr., Rodney J. Reynolds, Ira H. Kent and Silver Range Ranch appeared or were represented at the hearing as intervenors.

(2) Whether the allotments to which the appellants were assigned provided them with a sufficient amount of usable Federal range forage to satisfy their Federal range demand; and

(3) Whether the decisions were arbitrary or capricious by reason of a denial to the appellants of the effective utilization of their claimed water rights or by reason of a creation of such a hardship as to impair seriously the appellants' livestock operations.

In a decision issued June 21, 1965, the hearing examiner found, in substance, that:

(1) The district manager's decisions did deprive the appellants of their historic areas of use, as they alleged, but the determination of the particular area in which grazing is to be permitted is a matter committed solely to the discretion of the Department, and no permittee can, as a matter of right, be heard to complain if the lands upon which he is permitted to graze are different from those which he used in the past (citing, *inter alia*, *National Livestock Company and Zack Cox*, I.G.D. 55 (1938); *R. B. Hackler*, I.G.D. 274 (1942); and *Alice and L. A. Matter*, I.G.D. 296 (1942));

(2) For the foregoing reasons there was no merit in Casey's argument that he is entitled to graze in the Grover Creek area (outside the Dixie Valley allotment) because he purchased the grazing privileges of Howard Turley in that area, since, if Turley had no right to graze in a particular area of the Federal range, Casey could not create such a right by purchasing Turley's base property qualifications;

(3) The evidence showed that the allotments were properly established for sound reasons and after adequate consideration (7 years) and, contrary to appellants' contentions, after numerous attempts on the part of the district manager to obtain voluntary agreements from the grazing licensees;

(4) The Bureau's range survey showed that the assigned areas of use produce sufficient forage to support the appellants' licensed livestock; there was no evidence that the survey was improperly conducted or that the results were erroneous; and the appellants' claim that a range operator "is in as good a position to judge the quality, quantity and manageability of a range as is a district official" was not persuasive (citing *Benjamin F. Casey*, I.G.D. 376 (1944); *C. A. George*, *Verva Brown*, I.G.D. 661 (1957); and *Wade McNeil et al.*, 64 I.D. 423 (1957));

(5) The fact that appellants own or control waters outside their allotted areas of use does not entitle them to graze in the area of those waters (citing *M. P. Depaoli and Sons*, I.G.D. 552 (1951), and *William Sellas*, I.G.D. 677 (1958)), and the denial of grazing privileges in the vicinity of the controlled waters is not a denial of appellants' right to the beneficial use of the waters which they control; and

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(6) While appellants testified that confining their livestock operations to the designated allotments would endanger their operations, they presented no specific evidence showing how, in what way, or to what degree this would add to the cost of their operations, and, while complaining of the requirement that they maintain fences and watering facilities constructed by the Government, they presented no evidence as to how much additional expense would be involved or whether it would significantly increase their operating costs.

In affirming the hearing examiner's decision the Office of Appeals and Hearings held, *inter alia*, that a party appealing from a decision of the district manager has the burden of showing by substantial probative evidence that the action complained of is improper (citing *M. F. Sullivan et al.*, 63 I.D. 269 (1956); and *E. L. Cord d/b/a El Jiggs Ranch*, 64 I.D. 232 (1957)), and it found that the appellants had not shown that the grazing areas awarded to them were insufficient to satisfy their grazing privileges or that they would create such a hardship as to seriously impair their livestock operations.

In their present appeals the appellants reiterate in large measure the arguments advanced before the hearing examiner and the Director. In general they attack the allotments as unnecessary and improper and as having been based upon survey data that was insufficient and inaccurate. The substance of their specific contentions is that:

(1) The deprivation of effective lawful use of water is basically a deprivation of ownership rights and was avoidable here; the right to water is an empty title when practical access to the water source is denied, and the Bureau's decision avoided the crucial issue as to whether total deprivation of access to water is a taking without compensation;

(2) The finding that agreements between the range users were sought is incorrect, the evidence showing that compromise possibilities were withheld from the appellants and that certain common use allotments could have been allowed;

(3) Insufficient notice of the proposed allotments was given to the appellants; and

(4) The hearing examiner improperly placed on the appellants the burden of estimating specifically the probable added costs which they would have to bear as a result of the district manager's decision.

It is, of course, inherent in the assignment of individual grazing allotments in a grazing unit which has been grazed in common that some, if not all, of the licensees may be prevented from grazing in some areas which they have utilized in the past. The Department has consistently sustained such allocation of the range, however, as a proper exercise of Departmental discretion where it is determined to be in the interest of sound range management practice, and, as the hearing examiner and the Office of Appeals and Hearings have pointed



out, the only basis upon which an allotment may be challenged is that the allotment does not, in fact, have the grazing capacity found by the Bureau and that it is incapable of satisfying the allottee's authorized grazing use. See, e.g., *Harold Babcock et al.*, A-30301 (June 16, 1965); <sup>4</sup> *Melvin Adams et al.*, A-30406 (November 1, 1965). In this instance the hearing examiner found that there was a reasonable basis for the determination that the grazing unit should be divided into allotments and that the appellants' allotments contained adequate forage to satisfy their qualified range demand. Despite their attacks upon the validity of these propositions the appellants have not, by the introduction of any positive evidence, shown these conclusions to be in error. Moreover, the fact that only two of fourteen qualified users have challenged the district manager's determination attests to both the basic soundness of that action and the general fairness of the range apportionment scheme.

Apart from the basic merits of the range apportionment, appellants contend that the methods used in determining the areas of allotment were procedurally defective. Particularly, they complain that the district manager ignored mandatory Bureau policy in failing to obtain any written agreements prior to the accomplishment of the adjudication in question.<sup>5</sup>

Notwithstanding his comment that the "Manual of the Bureau is not a regulation, binding on either the public or the district manager," the correctness of which we find it unnecessary to discuss, the hearing examiner found that, contrary to the appellants' contention, the record showed that numerous unsuccessful attempts were made to obtain written agreements with the range users. We think the record supports his finding.

The appellants' contention appears to be that the fact that no written agreements were obtained is evidence that the district manager failed to follow the prescribed practice of seeking voluntary agreements with the range users before establishing grazing allotments. The established facts, however, may as reasonably be construed as evidence that there were no written agreements because no voluntary agreement could be reached, and, in fact, the record warrants such a conclusion. The observations of the district manager (Tr. 185)

<sup>4</sup> The *Babcock* decision has been challenged in an action entitled *James Babcock et al. v. Stewart L. Udall*, Civil Action No. 1-66-87 in the United States District Court for the District of Idaho, Southern California.

<sup>5</sup> BLM Manual, section 4111.32F3, provides in part that:

"It is the practice of the Bureau to establish allotments by agreement based on an equitable adjudication or apportionment of the Federal range. The district manager will seek the agreement of the range users in a given area to the establishment of individual and group allotment boundaries. All such agreements shall be reduced to writing and signed by the affected range users and the district manager. \* \* \* Failure on the part of the range users to reach full agreement on allotments or range lines will not be reason to delay indefinitely their establishment. If there is substantial agreement and/or in the judgment of the district manager, the Federal range would be benefited thereby, he may render a decision creating such allotments or range lines subject to the right of appeal."

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with respect to the difficulties encountered in attempting to obtain voluntary agreements for use of the range are supported by the explicit statement of one of the intervenors, in a brief filed in opposition to appellants' position, that:

Insofar as the winter sheep use area south of U.S. 50 is concerned, Ellison has taken the position that it does not want a common use allotment with Ormachea. There is no possibility of agreement here with Ormachea \* \* \*

On the other hand, the most effective rebuttal of the district manager's representations would be an agreement for range use entered into voluntarily by most, if not all, of the grazing permittees. The appellants have offered neither such an agreement nor evidence that it is obtainable. The instances cited by appellants in which the district office purportedly failed to pursue areas of compromise (see Tr. 84-85, 232-235) do not support their contentions, for there is no evidence that the appellants have ever been willing to accept the terms of any compromise that was acceptable to the other permittees affected.<sup>6</sup>

The fact appears to be that appellants would be satisfied only with (1) the abolition of separate allotments and a return to grazing in common so far as their former areas of use are concerned or (2) an enlargement of their allotment boundaries to include areas formerly grazed by them. For example, Ormachea wishes to continue grazing on the west slope of the Clan Alpine Mountains because he says the better forage is there. If the Clan Alpine allotment were enlarged to include that area, it would reduce the size of the adjoining Cow Canyon allotment and the amount of forage in that allotment. Ormachea does not even claim that the Cow Canyon allotment has forage excess to the needs of the users in that allotment. Where would those users go for the needed forage?

On the other hand, if the boundaries (and fencing) between the Cow Canyon and Clan Alpine allotments and between the Dixie Valley and Clan Alpine allotments were abolished so that the area in the allotments was grazed in common, the problems of improper range use due to competition for the best areas, friction between users, and trespassers testified to by the principal Bureau witness (Tr. 34-38, 59-61, 77-79) would return.

The crux of the appellants' case lies in the contention that they have been deprived of a valuable property right in being denied access to water sources owned or controlled by them in areas now within other allotments. They further contend that the principles set forth in the *Sellas* case, *supra*, were misapplied in this case.

<sup>6</sup> While Ormachea, for example, stated that he was not informed, prior to the hearing, that Ellison and Magnuson did not really care whether they had Bell Flat or Labeau Flat (Tr. 232) and that he would prefer the Bell Flat allotment over the Labeau Flat allotment (Tr. 234), there is nothing in his testimony at the hearing to indicate that he would have been satisfied had he been allotted Bell Flat *instead of* Labeau Flat.

While it is true that the *Sellas* decision dealt with somewhat different circumstances than are found here, the *Depaoli* decision, *supra*, also cited by the hearing examiner, dealt with the same problem. In that case, involving grazing privileges in this same grazing district, the licensees, accustomed to grazing on both slopes of the Virginia Mountains, were confined to grazing on the east slope of the mountains. In answering their contention that their exclusion from the west slope amounted to a deprivation of the use of waters to which they have a vested right the Department stated that:

With respect to the appellants' assertion regarding water rights on the west slope, it may be noted that the possession of water in this area is irrelevant to the legal question before us, as land is the base for the granting of grazing privileges in Grazing District No. 3. It may be that the appellants do have water rights on the west slope, but, if so, the mere possession of such rights does not entitle them to graze their livestock on the west slope. Consequently, it is unnecessary to pass upon the validity of the claim asserted by the appellants respecting water rights. I.G.D. 552 at 554.

In short, the Department held simply that such water rights do not vest in the holder thereof any right to graze livestock in the area serviced by his waters where land is the base for granting privileges. Land is the base in the Fallon unit (Tr. 119).

It is contended, however, that the failure of the Department to give effective recognition to these water rights is in violation of section 3 of the Taylor Grazing Act, 48 Stat. 1270 (1934), as amended, 43 U.S.C. § 315b (1964), which provides in part:

\* \* \* That nothing in this Act shall be construed or administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacturing, or other purposes which has heretofore vested or accrued under existing law validly affecting the public lands or which may be hereafter initiated or acquired and maintained in accordance with such law. \* \* \*

We think it is clear that the water rights which are protected by this provision are those which exist independent of any grazing privileges. The act cannot reasonably be construed to support appellants' proposition that because an individual has been granted water rights on public land in order that he can utilize his grazing privileges it should follow that he is entitled, as a matter of right, to the use of the land serviced by his water sources in order that he may utilize his water rights. Rather, it seems obvious that where a water right is granted as an incident to the use of particular land, and the right to the use of that land is terminated, the purpose of the water right no longer exists, and the water right itself ought to terminate.

If appellants' contention is pursued to its logical extreme, its speciousness is clearly exposed. The Taylor Grazing Act is not just a grazing statute. On the contrary, it is a statute providing for an inventory of public lands and for the disposal of the lands in accord-

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ance with their highest use. Thus, section 7 of the act, as amended, 49 Stat. 1976 (1936), 43 U.S.C. § 315f (1964), provides for the classification of lands *in grazing districts* which are more valuable for agriculture than for forage or more valuable for any other use than that provided under the act (grazing) or proper for acquisition in satisfaction of outstanding lieu, exchange, or script rights or land grant and for the disposal of such lands in accordance with such classification. Note that in the scheme of classification grazing is the lowest use. Also, section 8 of the act, as amended, 49 Stat. 1976 (1936), 43 U.S.C. § 315g (1964), provides for the exchange of lands in grazing districts for privately owned or State-owned lands. It has been specifically held that existence of a grazing permit does not prevent a private exchange for the land included in the permit. *LaRue v. Udall*, 324 F.2d 428 (D.C. Cir. 1963), *cert. denied*, 376 U.S. 907 (1964).

If appellants' contention is sound, no grazing land surrounding a water source in which the grazing permittee or licensee has a water right could be disposed of under section 7 or 8 of the act because such disposal would deprive the permittee or licensee of access to the water and therefore effectively prevent him from exercising his water right. Clearly, this was not the intent of section 3 of the act. To hold that it was would be to impute to Congress the intention that administration of the public lands for grazing and other land disposals and uses could be frustrated by State action in granting water rights. We can find no such intent.

One of the basic problems here, which was recognized by the Bureau (see Tr. 188), is that while grazing of the public lands is done under license of the Federal government the use of waters on those lands by individual grazing licensees is authorized by the State of Nevada. Thus, we have the anomaly that it is possible for an individual to have the right to the use of a water supply as an incident to his use of land which he has no right to use. The fact that this situation may exist, however, cannot enlarge the rights of a grazing permittee to vest in him an interest in land which is not authorized by law.<sup>7</sup>

That the appellants' water rights are of value to their ranching operations and that the effect of the district manager's decision was to deprive appellants of the effective use of waters excluded from their allotments were acknowledged by the Bureau (see Tr. 55). The record shows, however, that these factors were considered in the adjudication of grazing privileges (see Tr. 56), but, when weighed against other elements of range management, location of fences, apportionment among range users, etc., the appellants' water rights were found not of

<sup>7</sup> Although recognizing no special grazing rights in the holder of a water right in this situation, the Bureau of Land Management currently is studying possible alternatives to the rather undesirable results which have come from this separate and sometimes ill-coordinated jurisdiction over resources.

sufficient weight to constitute the controlling factor.<sup>8</sup> The principle thus applied was, in essence, that which was recognized in *United States v. Cox*, 190 F. 2d 293 (10th Cir. 1951), *cert. denied*, 342 U.S. 867 (1951), in which the court refused to recognize the right of ranchers to compensation for the value of grazing privileges lost when their private lands were taken by the Government for public purposes. There the court stated that:

Unquestionably, the grazing permits were of value to the ranchers. They were an integral part of the ranching unit—indeed, the fee lands are practically worthless without them. But, “the existence of value alone does not generate interests protected by the Constitution against diminution by the government, however unreasonable its action may be.” [Citation omitted.] The Constitution requires only that the sovereign pay just compensation for that which it takes, “not for opportunities which the owners may lose.” \* \* \* 190 F. 2d at 295.

Thus, while recognizing the value of appellants’ water rights, the Bureau properly found that this value did not generate any interests in the appellants which were entitled to protection or for which compensation could be made in case of loss.<sup>9</sup>

It is by no means clear, however, that appellants have, in fact, suffered any substantial loss.<sup>10</sup> The underlying premise of the division of the grazing unit into allotments is that these allotments, under proper management, ultimately will inure to the benefit of all of the grazing users. If this premise is valid, if the appellants have, in fact, been allotted adequate grazing use to satisfy their qualified demand, if, among all of the permittees in the Fallon unit, the appellants have received their equitable portion of the total grazing privileges, and if the determined range allocation will permit them to continue their

<sup>8</sup> In this connection note may be taken of appellants’ complaint that they have not been accorded the preference conferred by section 3 of the Taylor Grazing Act, 48 Stat. 1270 (1934), as amended, 43 U.S.C. § 315b (1964). This section provides in part that \* \* \* “Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them \* \* \*.”

This provision does not assign any order of preference among the three categories of persons named. It does not give the owner of water rights preference over the settler or landowner engaged in the livestock business or any of the latter over the others. All the other licensees in the Fallon unit are presumably landowners engaged in the livestock business and have an equal plane of preference with the appellants. Over whom then are appellants entitled to a preference?

<sup>9</sup> It is interesting to note from the dissenting opinion in *United States v. Cox*, *supra*, that the landowners whose privately owned lands were being condemned had developed valuable water and water rights in those lands. From the dissenting opinion it appears that the majority of the court held that in determining the value of the water rights for which compensation was to be paid by the United States there was to be excluded the value of those rights attributable to the grazing privileges that the landowners had had on the adjoining public lands.

<sup>10</sup> Appellants complain that they will not be compensated for the loss of improvements at water sources which are not included in their allotments and that others will be allowed to use those improvements. We do not find that any of the decisions below have held that appellants will not be entitled to any compensation to which they are entitled pursuant to section 4 of the Taylor Grazing Act, 48 Stat. 1271 (1934), 43 U.S.C. § 315c (1964), and the applicable regulation, 43 CFR 4115.2-5.

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ranching operations without serious impairment, they have no basis for complaint. Despite some assertions to the contrary, appellants have not shown by any persuasive evidence that these aims cannot be achieved under the district manager's decisions.

Appellants' remaining contentions have been considered and are not found to demonstrate error in the Bureau's conclusions. Accordingly, their appeals were properly dismissed.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision appealed from is affirmed.

ERNEST F. HOM,  
*Assistant Solicitor.*

### APPEAL OF KEAN CONSTRUCTION COMPANY, INC.

IBCA-501-6-65

*Decided November 9, 1966*

#### Contracts: Disputes and Remedies: Substantial Evidence—Rules of Practice: Appeals: Burden of Proof

When an appellant has submitted evidence of a substantial nature tending to establish that rock, within the meaning of the specifications, was encountered and removed, and the Government offers little, if any, counter proof the contention of the appellant must be accepted.

#### Contracts: Construction and Operation: Changes and Extras—Contracts: Construction and Operation: Actions of Parties

Work not required by the specification but performed by appellant on his own initiative without the contracting officer's approval is voluntary and appellant is not entitled to additional compensation for voluntary work.

#### BOARD OF CONTRACT APPEALS

The Kean Construction Co., Inc., appellant and the contracting officer, representing the Bureau of Sport Fisheries and Wildlife, Region 4, Atlanta, Georgia, under date of January 31, 1964, entered into Contract No. 14-16-0004-103, for the construction of approximately 20 miles of roadway. The contract was prepared on Standard Form 23 (January 1961), and embodied Standard Form 23A, General Provisions (April 1961), which includes the standard clauses for changed conditions and disputes.

The work included clearing and grubbing of rights-of-way for road construction; removal and disposal of existing corrugated metal cross drainpipe; cutting, filling, and gradings; clay base and surfacing course; eight (8) reinforced concrete drainage structures; three (3) control structures; bituminous surfacing; and various allied items. The work was to be performed at the Carolina Sandhills National Wildlife Refuge, McBee, South Carolina.

The contract price based upon estimated quantities of work was \$227,250.50. The contract was to be completed within four hundred and fifteen (415) calendar days after receipt of written notice to proceed. The contract was modified during its performance in both the price and completion time.

During excavation of a road, appellant encountered a hard material which he claimed was rock. The contracting officer's representative did not agree that the hard material was rock. Appellant blasted the material and removed it and then filed a claim in the amount of \$27,694.10 for excavating 2,769.41 cubic yards of rock at the contract price of \$10 per cubic yard. The contracting officer denied the claim in his Findings of Fact and Decision dated April 20, 1965.

Appellant timely appealed the contracting officer's decision and requested that if the claim could not be allowed for rock excavation that it be allowed as a changed condition. A hearing on the appeal was requested and was held in September 1965, at Columbia, South Carolina.

#### *How the Claim Developed*

The excavation work to be performed under the contract was described in the specifications,<sup>1</sup> as common excavation, but included a provision to cover rock if encountered.

Appellant's difficulty occurred during a ten-day period starting (Wednesday) May 27 and ending (Friday) June 5, 1964, and involved excavation on Road No. 1, between Stations 255+50 and 261+50. When the overburden between those stations was removed, a layer of hard material substantially above the grade elevations shown on the contract drawings was encountered. Appellant's superintendent described in considerable detail the effort that was made for approximately one day to remove the hard material with power equipment without success.<sup>2</sup> Appellant's superintendent was of the opinion the hard material was rock, and discussed the matter with the contracting officer's representative who made a visual inspection of the material

<sup>1</sup> "SECTION 3, GRADING AND COMMON EXCAVATION.

"3-01. GRADING AND COMMON EXCAVATION shall consist of the grading and excavation for roadway, ditches; construction of fill areas; and their appurtenances; all to the lines, grades, elevations, and sections as shown on the drawings and as staked.

\* \* \* \* \*

"3-05.3a. ROCK, if encountered, at or above subgrade elevation shall be removed in conformance with the requirements of Section 5, 'ROCK EXCAVATION.'"

<sup>2</sup> Appellant's superintendent's affidavit dated November 5, 1964. "We employed the use of six (6) ripper teeth bolted to the cutting edge of a LeTourneau-Westinghouse 'C-Pull,' being pushed by a Michigan 180 Dozer, in attempting to rip the rock. The ripper teeth had a total cross-sectional area of six (6) square inches, and the total weight applied to the ripper teeth was thirty thousand (30,000) pounds. The force applied to the ripper teeth as seventy-four thousand five-hundred ninety (74,590) pounds of rimpull, and the resultant pressure applied to the ripper teeth was not less than five thousand (5,000) pounds per square inch. All these efforts failed to penetrate the rock, and I demonstrated to Mr. Pauley the efforts that were being made to remove the material with power equipment."

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on the afternoon of May 28, and advised that the hard material was not rock.<sup>3</sup> However, appellant's superintendent was still of the opinion that it was rock and so advised the contracting officer's representative and requested that payment be made for its removal as provided in the specification.<sup>4</sup> The contracting officer's representative denied the request<sup>5</sup> because in his opinion the hard material was kaolin clay<sup>6</sup> and that it could have been removed by the use of proper power equipment.

There was considerable testimony by Government witnesses concerning the use of proper equipment and what measures should have been taken to remove the hard material.<sup>7</sup> Notwithstanding the Government's position that proper power equipment was not being used the definition of rock contained in the specifications did not specify the kind of power equipment to be used.<sup>8</sup> The Government did not disagree with appellant's description of the efforts made to remove the hard material.<sup>9</sup> This was, perhaps, due to the fact that the contracting officer's representative left the site of the work in the afternoon of May 28, 1964, after making a visual inspection of the hard material<sup>10</sup> and no one representing the Government was present when appellant was attempting to remove it. Because of the inability to remove the hard material with the power equipment being used on the work, appellant had a total of twenty-three (23) holes, varying in depth, drilled in the hard material so it could be blasted.<sup>11</sup> The drilling and

<sup>3</sup> Tr. p. 265.

"Q. You took the position with Mr. Lamb that the substance, that the substance he had encountered was not rock, that is correct statement of your testimony, isn't it?

"A. I took the position with Mr. Lamb that the substance could be removed.

"Q. That it was not rock in the sense of the contract?

"A. Correct."

<sup>4</sup> SECTION 29, MEASUREMENTS AND PAYMENTS.

"29-04.2 PAYMENT.

"29-04.2a PAYMENT for ROCK EXCAVATION will be made at the rate of TEN DOLLARS (\$10) PER CUBIC YARD, which price shall cover all costs for labor, materials, equipment, and transportation for REMOVAL AND DISPOSAL, complete for acceptance."

<sup>5</sup> Tr. p. 246.

"Q. So you were aware of a controversial situation where he was asking you for rock payments, and it was your position, as I understand it, that was and still is, that he was not entitled to rock payment?

"A. Yes."

<sup>6</sup> Tr. p. 215.

"A. I was not requested to make cross-sections at that time, or any other time, of that area. If, in my opinion, it had been rock, I would have said so to Mr. Lamb, and I would have made those cross-sections, but I don't make cross-sections on an area where the type of material is, before the type of material is finally determined on it, and he was not making a big effort to prove to me that this was anything other than just kaolin clay \* \* \*

<sup>7</sup> Tr. pp. 232 and 233.

<sup>8</sup> SECTION 5, ROCK EXCAVATION.

"5-01. ROCK EXCAVATION is defined as the removal of solid rock, ledges, and boulders having a volume greater than one-half ( $\frac{1}{2}$ ) cubic yard, which cannot be removed by the proper use of power equipment or which requires the continuous use of explosives."

<sup>9</sup> Tr. p. 245.

<sup>10</sup> Tr. p. 264.

<sup>11</sup> Walker Laboratories, Report B-18617, dated May 29, 1964. "Twenty three borings were made at locations and to depths designated by Kean Construction Co. Borings were



blasting were done in one day <sup>12</sup> and the combined drilling, blasting and removal of the hard material required approximately two (2) days.<sup>13</sup>

Each blast broke up the hard material for an area of approximately five (5) feet in diameter <sup>14</sup> and caused cracks to develop so the ripper teeth attached to the power equipment could penetrate and remove it.<sup>15</sup> When the hard material was removed down to subgrade a water problem developed. To overcome the water problem appellant's foreman testified that he excavated all remaining hard material from the roadbed approximately three (3) feet below the subgrade.<sup>16</sup>

The contracting officer's representative was not present when appellant was attempting to remove the hard material with the power equipment being used on the work or when the blasting was done; nevertheless, he was of the opinion that the blasting was not necessary to remove the material; that it was done to expedite the excavation; and that the twenty-three (23) blasts would have been inadequate to permit removal of rock in an area 600 by 30 or 40 feet.<sup>17</sup>

Neither the water problem encountered at the subgrade; the extra depth of the excavation to remove all of the hard material from the roadbed; nor the filling of the area from which the hard material was removed were discussed with the Government. The record is clear that if the hard material was rock, it was removed and placed in fill area contrary to the specifications.<sup>18</sup>

The placing of the hard material in the fill areas was done at the direction of appellant's superintendent <sup>19</sup> and it was done when there

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made into a plastic, kaolin-line, clay for the placing of dynamite charges to loosen the soil to expedite removal by mechanical means. Depths of borings were as follows:

11 holes to 5' depth,  
6 holes to 4' depth,  
3 holes to 3' depth,  
3 holes to 1' depth.

Total— 23 holes, 91 feet of drilling."

<sup>12</sup> Tr. p. 110.

<sup>13</sup> Tr. p. 126.

<sup>14</sup> Tr. pp. 107 and 108.

<sup>15</sup> Tr. p. 121.

<sup>16</sup> Tr. p. 98.

"Q. After you removed this hard substance, was there further excavation and removal of material?

"A. Well, after we moved it, removed the rock down to the grade, we had a water problem. There was still rock holding the water. We went approximately, well, three feet, and backfilled with select material.

"Q. You went three feet, do you mean three feet down below grade level, is that what you are saying?

"A. Yes, sir."

<sup>17</sup> Tr. p. 234.

<sup>18</sup> "SECTION 5, ROCK EXCAVATION

\* \* \* \* \*

"5-02. DUE CARE SHALL BE EXERCISED DURING ALL BLASTING OPERATIONS TO PROTECT THE SURROUNDING AREA FROM DAMAGE.

"5-03. Rock removed in this manner shall be wasted on areas designated by the Government Representative."

<sup>19</sup> Tr. p. 117.

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was no one at the site representing the Government.<sup>20</sup> The Government did not question why appellant excavated the hard material approximately three feet below the subgrade except that the Government's Assistant Regional Engineer did indicate that it was voluntary.<sup>21</sup> After all of the hard material was removed from the roadbed, the area was backfilled with select material up to grade.<sup>22</sup> Moisture in the fill caused it to hump when heavily loaded road equipment passed over it.<sup>23</sup> To overcome the humping appellant was authorized to place an extra foot of fill on the road between Stations 251+50 and 261+50.<sup>24</sup> Because of the extra fill, the finished road grade between Stations 251+50 and 261+50 is generally one foot higher than the grade shown on the contract drawings.

There was considerable testimony at the hearing about cross-sections and especially those prepared by appellant. For that reason, some discussion of the matter is appropriate. The appellant's superintendent asserted that when the contracting officer's representative visually inspected the hard material encountered in the excavation, the superintendent asked that the representative make cross-sections of the excavation so that the volume of rock removed could be determined accurately, but that the contracting officer's representative refused to do so.<sup>25</sup> Appellant's foreman in whose presence the request was allegedly made testified that it was made in his presence.<sup>26</sup> The contracting officer's representative denied that he had been requested to make cross-sections of the excavation<sup>27</sup> and the Government never made cross-sections of the excavation.<sup>28</sup>

Appellant, in order to determine the amount of hard material excavated, made cross-sections of the excavation from which the amount of rock claimed was based and a copy of the cross-sections was furnished to the contracting officer when claim for rock excavation was made initially.<sup>29</sup> While the contracting officer did not comment on the cross-sections in his Findings of Fact denying appellant's claim, objection was raised at the hearing by the Government's Assistant

<sup>20</sup> Tr. p. 228.

<sup>21</sup> Tr. p. 301.

"Q. You have made certain assumptions here from other sources. Suppose we add to it the assumption that Mr. Blackmon, as he stated, excavated to a point until he had gotten through the disputed substance. Would that not account for why, later on after the completed surfacing, that Law found no rock under the road bed itself?

"A. If he excavated below the road bed, if he went through the rock, which was also below the road bed, he had no occasion to do it; he is doing it on his own hook. He was never \* \* \*"

<sup>22</sup> See Note 16, *supra*.

<sup>23</sup> Tr. p. 253.

<sup>24</sup> Tr. pp. 253 and 254.

<sup>25</sup> Appellant's superintendent's Affidavit dated November 5, 1964.

<sup>26</sup> Tr. p. 97.

<sup>27</sup> Tr. p. 258.

<sup>28</sup> Tr. p. 97.

<sup>29</sup> Appellant's letter of September 21, 1964 to Regional Engineer.

Regional Engineer to the adequacy of the cross-sections, especially since they did not show any elevations of the rock alleged to have been encountered.<sup>30</sup> Much ado was made over the fact that the cross-sections were not made in accordance with the specification.<sup>31</sup> However, appellant insisted that, while it was not his responsibility to make cross-sections, the cross-sections he made were adequate to show the rock that was excavated.<sup>32</sup> Appellant gave this explanation of how the cross-sections were made. Appellant's superintendent furnished the information from which the cross-sections were made. The bottom of the cross-sections represent the bottom of the rock that was in the cut before it was excavated. The top of the cross-sections represents the top of the rock that was in the cut before it was excavated. The vertical distance between the bottom and top represents the thickness of the rock in the cut that was excavated. The cross-sections were made at each station. Thus, appellant claims that it had no difficulty in determining the amount of rock excavated.<sup>33</sup> Testimony of Government witnesses indicates that the specifications required cross-sections to be prepared in a particular manner and that appellant did not follow that procedure.<sup>34</sup> The contract also specifies the manner in which any rock excavated is to be measured for payment.<sup>35</sup> There is no provision in the specifications, however, requiring appellant to prepare the cross-sections. Rather, the specifications require that the

<sup>30</sup> Tr. p. 281.

In response to a question as to whether the cross-sections established estimates of rock excavation volume, the Assistant Regional Engineer stated:

"A. In my opinion, no, sir. The only thing that shows the location is the station number, the sections, the end sections as drawn could be drawn to any scale or any depth. They are perfectly level, which could be one chance in a million in rock surface. The end area itself would depend entirely at the vertical height in the section of the road. It would either increase or decrease the volume accordingly, and without an elevation pining down either the bottom or the top, we have no way of knowing where the section is, actually what the volume would be; in other words, it is a piece of paper which is meaningless as far as I am concerned."

<sup>31</sup> Tr. p. 168.

"Q. You are acquainted with the provisions of the specifications, 2904 Records Division, 29-04.1, Measurements, and 29-041C, Volume, in which you determine by the average end area method based on the ground elevations taken at the time rock is uncovered and the design elevations as shown in the drawings on the stake plus allowances as set out above. Now, have you complied in this particular exhibit that you have in the file here, known as the cross-sections? Have you complied with the requirements of that specifications?"

"A. Mr. Corbett, I don't believe it is incumbent on me to comply with the detail requirements for making cross-sections in the roadway, since it is not the responsibility as a normal thing for the contractor to make those cross-sections. They were made by us only because the Government representative declined to make them.

<sup>32</sup> Tr. pp. 184 and 185.

<sup>33</sup> Tr. pp. 166, 196 and 197.

<sup>34</sup> See note 31, *supra*.

<sup>35</sup> "SECTION 29, MEASUREMENTS AND PAYMENTS.

"29-04. ROCK EXCAVATION

"29-04.1 MEASUREMENT

"29-04.1c VOLUME to be determined by the AVERAGE END AREA METHOD based on ground elevations taken at the time rock is uncovered and the design elevations as shown on the drawings and as staked, plus allowances as set out above."

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Engineer will furnish all necessary information relating to lines, slopes, and grades.<sup>36</sup>

To substantiate his position that the hard material excavated from the roadbed was rock, appellant obtained two pieces of the hard material from the roadway between Stations 255+50 and 261+50 which he identified as Samples No. 1 and No. 2 and obtained two pieces of the hard material from the ditchline excavation between Stations 157+50 and 162+00 which he identified as Samples No. 3 and No. 4.<sup>37</sup>

Samples identified as No. 1 and No. 4 were delivered to Walker Laboratories with instructions for testing.<sup>38</sup>

Three pieces from each sample were tested for ultimate load in pounds and ultimate stress, psi with the following results. For Sample No. 1 the ultimate stress ranged from 2,918 to 7,022 psi. The low stress was from the sample that had a visible diagonal seam in it. For Sample No. 4 the ultimate stress ranged from 4,116 to 4,764 psi.<sup>39</sup> The hardness of the hard material is indicated when the ultimate stress, psi, for the samples tested is compared with clay brick which range from 3,000 psi for hard, 2,500 psi for medium, and 1,500 psi for soft.<sup>40</sup>

Two other pieces of hard material from the same locations were also obtained, which appellant identified as Sample No. 2; obtained from the roadway excavation between Stations 255+50 and 261+00 and Sample No. 3 obtained from the ditchline excavation between Stations 157+50 and 162+00.<sup>41</sup> These two samples were delivered to the Department of Geology, University of South Carolina, with instructions to make a complete analysis of the two samples and to furnish a report.<sup>42</sup> Dr. Bruce W. Nelson, Head, Department of Geology, University of South Carolina, was engaged by appellant to examine the samples of hard material and to furnish his opinion on other aspects of the rock claim.

After examining a freshly broken surface under low magnification and a thin slice under high magnification, Dr. Nelson concluded that the material was rock.<sup>43</sup> Later, as a result of an on-site geologic examination of the material exposed in the road construction and specimens from the same locations where Samples No. 2 and No. 3, previously

<sup>36</sup> "SECTION 1, GENERAL

"1-03. ENGINEERING SERVICES

"1-03.1 THE ENGINEER will set construction stakes establishing lines, grades, center lines, and bench marks as he may deem necessary and will furnish the Contractor all necessary information relating to lines, slopes and grades."

<sup>37</sup> Affidavit of William M. Kean, dated November 5, 1964.

<sup>38</sup> Affidavit of William M. Kean, dated November 5, 1964.

<sup>39</sup> Walker Laboratories Report B-19627, dated October 29, 1964.

<sup>40</sup> Civil Engineering Handbook, Fourth Edition, by Leonard Church Urquhart, Editor-in-Chief, Table 3, Mechanical Properties of Some Engineering Materials, pages 3-15, Section 3, Mechanics of Materials, Edited by Jesse B. Kommers, M.E., Professor of Mechanics Emeritus, University of Wisconsin.

<sup>41</sup> See note 37, *supra*.

<sup>42</sup> Affidavit of William M. Kean, dated November 5, 1964.

<sup>43</sup> Dr. Nelson's letter dated October 30, 1964, to appellant stated: "This material would be classified as rock by the geologist, more particularly as a variety of rock called silt-

identified, were obtained, Dr. Nelson again classified the material as rock.<sup>44</sup>

Photomicrographs of a thin section taken from Sample No. 2 were were also submitted and described,<sup>45</sup> which clearly illustrate the origin of the high mechanical strength of the rock.<sup>46</sup>

Dr. Nelson's two reports containing the above material were specifically considered by the contracting officer in his findings.

After receiving appellant's original claims for rock excavation the contracting officer employed the Law Engineering Testing Company to make subsurface soil investigations at the road site. That Company made eight (8) test borings and six (6) auger borings. The test borings were all made through the asphalt at the center of the completed road and were located at Stations 255+50 through 261+50. The auger borings were all made 24 to 35 feet right or left of the centerline of the finished road and generally in the slope or bank of the road.

The test borings ranged in depth from four to six feet. The auger borings were all one and one half (1½) feet in depth and no rock was encountered in any of the borings.<sup>47</sup>

stone. It consists of particles of mineral grains of predominantly silt size that have been cemented together by secondary silica and clay. It is this silica and clay cementation that gives the rock its hardness.

"Geologically 'rock' is defined as any consolidated or coherent and relatively hard naturally formed mass of mineral matter (Glossary of Geology, p 249, American Geological Institute). This definition distinguishes rock from 'soil' which is neither coherent nor hard. As a practical test in geology anything which must be broken with a hammer would be classed as rock. Both Samples # 2 and # 3 are hard and coherent enough that they must be broken with a hammer.

"Megascopically and microscopically both Samples # 2 and # 3 are very similar."

<sup>44</sup> Dr. Nelson's letter dated November 27, 1964, to appellant states in the last sentence of the third paragraph: "It is my opinion that the rock ledges exposed at stations 158-162 and 255-260 are the same geologic unit."

<sup>45</sup> Dr. Nelson's letter dated November 27, 1964, to appellant describes Photomicrographs, all taken from a thin section of Sample No. 2, which illustrates the nature of the grain to grain contacts that bond the material together, by these statements:

"Photomicrograph # 2 shows very clearly the nature of silica cementation between grains A, B, and C and clay cementation between these and other grains. It is this kind of bonding that gives the rock its great mechanical strength.

"Photomicrograph # 4 is a highly magnified view of normal and cemented grain to grain contacts.

"Photomicrograph # 5 shows normal and clay cemented contacts, also highly magnified.

"Photomicrograph # 7 shows clearly the cementation between grains A and B in photomicrograph # 9. This bond also is a very strong one.

"Photomicrograph # 9 shows very typical relations at moderate magnification. The large grains labelled A, B, C, and D are quartz grains. Between grains A and C are 'normal' grain to grain contacts frequently observed in sandstones and siltstones. Between grains A and B a silica cemented contact can be observed. Between grains A and B a silica cemented contact can be observed. Between grains A and D a clay cemented grain-grain contact can be observed. Where clay cement holds grains together there is evidence of a chemical reaction as revealed by the irregular edge of grain D.

"Photomicrograph # 12 shows highly magnified clay cement at an irregular chemically corroded grain boundary."

<sup>46</sup> Dr. Nelson's letter dated November 27, 1964, to appellant at the start of first paragraph at top of last page states: "The preceding photomicrographs illustrate very clearly the origin of the high mechanical strength of this rock and it is not surprising that simple wetting is not sufficient to destroy the strength."

<sup>47</sup> The Law Engineering Testing Company letter report, dated November 17, 1964, contains the following under Subsurface Conditions: "In summary, no materials that could be

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On May 10, 1965, appellant and Dr. Nelson had the Walker Laboratories drill two test holes at sites just off the road. These holes were drilled to the right of the roadway centerline at Stations 259+00 and 260+00 and were located a sufficient distance out to permit the drilling to start in the undisturbed ground.<sup>48</sup> Walker Laboratories' report<sup>49</sup> shows that the two holes were each drilled 20 feet deep; that rock was encountered eight (8) feet below the surface at Station 259+00 and nine (9) feet below the surface at Station 260+00; that the rock ledge was seven (7) to eight (8) feet in thickness, respectively; that standard penetration tests were made in each hole when the rock was encountered; that the material in each hole was penetrated only four (4) inches; and includes other information. Walker Laboratories' employees who drilled the two holes and made the penetration tests testified concerning the procedure used and exhibited at the hearing the driving rods used in the penetration test, which were bent during the process indicating the hardness of the material.<sup>50</sup>

Dr. Nelson testified that the significance of drilling the two holes beside the roadbed was to determine the sequence of the materials

designated as rock, in the engineering sense, were encountered by the borings made in this investigation, and none were evident from a visual examination of the surface of the site."

<sup>48</sup> The last paragraph of Dr. Nelson's letter of May 14, 1965.

<sup>49</sup> Walker Laboratories report No. B-21366, dated May 17, 1965, contains the following information about each hole drilled:

"Bore No. 1	0'- 9'	Loose to firm, fine grain, tan-gray, sand
"Sta. 260+00	9'-16'	Hard, fine grain, gray, silty-clay
"65' Right CL	@- 9'	Penetration Test—100 Blows (Penetrated only 4")
"El. 344.4	16'-20'	Very stiff, fine grain, gray, clay-sand
	@-20'	Penetration Test—26 Blows
"Bore No. 2	0'- 8'	Loose to firm, fine grain, tan-gray, sand
"Sta. 259+00	8'-16'	Hard, fine grain, gray, silty-clay
"60' Right CL	@- 8'	Penetration Test—100 Blows (Penetrated only 4")
"El. 342.9	16'-20'	Very stiff, fine grain, gray, clay-sand"

<sup>50</sup> Tr. pp. 56, 57 and 58.

"Q. Tell us about the penetration tests.

"A. A penetration test, a standard penetration test is by dropping a hundred and forty pound hammer on your tube, a standard penetration tube, and you drop a hundred and forty pound hammer as many times as it takes to drive it one foot.

"Q. What distance did the hammer fall?

"A. Thirty inches. At nine foot the penetration test was run and one hundred blows penetrated only four inches into the hard material, using a \* \* \*.

"Q. How many blows?

"A. One hundred. Using a mining bit we continued to drill through this hard material. It existed from nine feet into sixteen feet.

"Q. I am asking rather than asserting. Are you saying that the hard material was from a depth of nine feet through and to a depth of sixteen feet?

"A. Yes, sir. At sixteen feet we reached a softer material which we classified as still very stiff. At twenty feet we run another penetration test. At this depth, twenty-six blows were obtained.

\* \* \* \* \*

"Q. What are those items that you are holding in your hand, Mr. James?

"A. These are drive rods. This is hooked to your tube, and you can make them different lengths to the depth you want to run your penetration test. At the top you drop your hammer, a hundred and forty pound, to the thing up here on the top. It falls thirty inches. During the course of this drilling, because it wasn't penetrating into the hard material it bent these rods.

"Q. Those rods were straight before you started drilling?

"A. Yes, sir."

which were at the natural topography and to demonstrate what had been removed in the course of excavation.<sup>51</sup>

Two reasons were given why the Law Engineering Testing Company did not encounter rock in the borings made through the center of the finished road surface, and in the road bank.

Dr. Nelson prepared a sketch, Exhibit 7, based on the information disclosed by the two holes drilled at Stations 259+00 and 260+00 showing the locations of the various materials in relation to the finished road surface.<sup>52</sup> He explained that the rock surface is indicated by very dark pencilled sketching which shows the distribution of the hard rock; a solid line shows the finished road surface; a dashed line indicates the bottom of the excavated surface, which corresponds relatively closely with the bottom of the hard siltstone layer; the excavated surface is shown approximately three (3) to three and one half (3½) feet below the finished asphalt surface; and the top of the siltstone layer is about three (3) or four (4) feet above the asphalt surface.

Testimony by appellant's foreman that he excavated all of the rock in the roadbed below the subgrade,<sup>53</sup> would explain the reason why the Law Engineering Testing Company failed to encounter rock when the test borings were made in the center of the road.<sup>54</sup> Appellant's foreman also testified that the reason no rock was encountered in the auger borings made by Law Engineering Testing Company was because they were drilled mostly where the slopes were wet and the top part had sloughed down over the rock, also they did not go deep enough.<sup>55</sup> Two rock samples were received at the hearing as Exhibits No. 1 and No. 2. Exhibit No. 1 was identified as a part of Sample No. 2 obtained from the roadbed and Exhibit No. 2 was identified as a part of Sample No. 3 obtained from the ditchline.<sup>56</sup> Dr. Nelson testified that these samples were broken from larger samples delivered to him.<sup>57</sup>

The Government did not dispute that the rock samples were from the roadbed and ditchline excavations but, maintained that the hard material that had been excavated was not rock within the meaning of the specifications.

### *Decision*

The Board determines that the hard material encountered and removed during excavation was rock, but for the reasons set forth

<sup>51</sup> Dr. Nelson testified as follows: (Tr. p. 22)

"Q. What was the significance of drilling beside the roadbed?

"A. We were interested in determining the sequence of materials which were at the natural topography. We drilled at the side to demonstrate what had been removed in the course of excavation."

<sup>52</sup> Tr. p. 39.

<sup>53</sup> See note 16, *supra*.

<sup>54</sup> See note 47, *supra*.

<sup>55</sup> Tr. pp. 138, 139.

<sup>56</sup> Tr. p. 17.

<sup>57</sup> Tr. p. 28.

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below, appellant is not entitled to payment for all of the rock claimed to have been removed.

The Board is aware that the encountering and removal of rock does not, per se, entitle appellant to payment. The rock must meet the definition given in the specifications.

Appellant has described in detail the power equipment used and the effort that was made in attempting to remove the hard material. The effort described in attempting to remove the hard material is not disputed by the Government. A Government witness, however, did assert that the type of equipment used was not, in his opinion, proper for this type of work. No demonstration was conducted by the Government, however, to ascertain what kind of equipment would move the hard material.

The Government's position was that by the use of proper power equipment the material could be removed. The Board has no quarrel with that premise since power equipment of adequate capacity that could have removed the material in its natural state probably does exist. But, is that what was contemplated by the contract? The specifications refer to "the proper use of power equipment," not "the use of proper power equipment." We do not consider that language as requiring appellant to import whatever type of power equipment was necessary to remove the material. Rather, we believe the language should be construed to apply to the power equipment normally used in constructing a road of this character. The appellant made a reasonable and determined effort to remove the material without success, with the equipment being used on the work. We think this fulfills the specifications requirement relating to removal of material by the proper use of power equipment.

Regarding the use of explosives, appellant did resort to blasting when it became apparent that the material could not be removed by the power equipment he was using. Two cases of dynamite were used and a total of 23 holes were drilled for placing the dynamite. While it would appear, as the Government contends, that 23 dynamite blasts would not be adequate to loosen rock in an area of 18,000 square feet (600 x 30) or more, it proved sufficient to permit the equipment on the job to remove the material in question.

Appellant stated that the blasting caused cavities to develop in the material and it was possible to get the ripper teeth, on the power equipment, into those cavities and thus remove the material. Since the Government had no representative present when the blasting took place, appellant's description of what was done and how the blasting permitted removal of the material was not challenged.

Appellant had samples of material which he claimed were obtained from the excavation tested for compressive strength and also had samples analyzed by Dr. Nelson, Head, Department of Geology, Univer-



sity of South Carolina. The compression tests showed that the material was as hard or harder than clay brick. The detailed analysis given by Dr. Nelson from his examination of the samples convinced him that the material was rock. Samples of the rock were also introduced as evidence at the hearing and there is no doubt that a reasonable person would, on visual inspection, classify those samples as rock. While the Government maintains that the material was not rock, it admits that it had no one present when the material was being removed and, consequently, did not see the material that was excavated. A visual inspection of the material at the time appellant was attempting to remove it was the only test applied by the Government to determine what the material was.

Dr. Nelson, from site inspection of the completed road and area adjacent thereto and from a study of test borings made at two locations at the side of the road also furnished his views, based upon geologic assumptions, of the probable formation of an underground layer of rock in the area. These studies and test borings when considered in the light of these geologic assumptions tend to substantiate that a ledge of rock did exist in this area, and specifically beneath the surface between Stations 255+00 and 261+00.

Dr. Nelson admitted that those assumptions were speculative and that without extensive test borings there would be no way to determine the actual conditions underlying that area. He was, however, very positive in his position that the rock ledge that had been removed from the roadway was exposed and could be seen in the bank of the road cut in the area in dispute.

The rock samples introduced at the hearing were offered in evidence as typical of the kind of material removed from the roadbed between Stations 255+50 and 261+50. While the Government offered nothing to refute the claim that the samples came from the area in question, it nevertheless clung to its opinion that the material removed from the roadbed was not rock.

The burden was on appellant to come forward with evidence to prove that rock was encountered.<sup>58</sup> This, appellant has done. The Government then had the burden of overcoming appellant's evidence.<sup>59</sup> This the Government failed to do. On the basis of the entire record before the Board, appellant's position that rock, within the meaning of the specifications, was encountered and removed is sustained by substantial evidence.<sup>60</sup>

<sup>58</sup> *T. E. Gillespie Construction Co., IBCA-333* (December 13, 1962), 1962 BCA par. 3599; *Coastal Contracting and Engineering Co., Inc., ASBCA No. 4835* (July 28, 1958) 58-2 BCA par. 1875.

<sup>59</sup> *Langwear, Inc., ASBCA No. 3607* (June 19, 1957) 57-1 BCA par. 1269.

<sup>60</sup> *Consolidated Edison Co. of New York v. National Labor Relations Board*, 305 U.S. 197 (1938).

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The question is how much rock did appellant excavate and remove for which he is entitled to payment. At the outset, it must be said that the Board has reservations concerning the extent of the rock in the disputed area. The only evidence with respect to the quantity of rock encountered and removed is that shown on the cross-sections submitted by appellant.

The evidence regarding the quantity of rock in the area is contradictory. The cross-section, Exhibit No. 7, made by Dr. Nelson indicates that the bulk of the rock should have been encountered in the excavation between Stations 258+00 and 260+00. Appellant's cross-sections show that the bulk of the rock was excavated between Stations 256+00 and 258+00 with little rock indicated at Station 260+00. On the sectional drawing prepared by Dr. Nelson and submitted to appellant with his letter of November 27, 1964, the bulk of the rock is shown between Stations 258+00 and 260+00 with no rock indicated at Station 256+00 and very little at Station 257+00.

Notwithstanding the above contradictions, there is sufficient credible evidence before the Board to support a determination that a quantity of rock was excavated for which payment should be made. To reach such a determination requires a reasonable reconstruction of what took place.

The cross-sections made by appellant on which his claim for payment is based will be accepted and used as the starting point. The Government labeled these cross-sections meaningless because they did not show elevations. Considered by themselves they probably would be of little useful value for our purpose. However, it is not difficult to determine within reasonable limits the elevations that should be put on the top and bottom of the cross-sections at each station. Appellant's witnesses testified that the depth of the rock that was excavated was between three and three and a half feet below the subgrade. Since the Government contended that there was no rock involved, the staked elevations for this portion of the road would logically have been the bottom of the clay base course of the road or six inches below the finished elevation shown on the contract drawings. By using the average of the figures given in the testimony for the depth of the rock excavated from the roadbed which is three feet three inches (3'3") the bottom of the rock or cross-section would be three feet three inches (3'3") below the base of the subgrade or three feet nine inches (3'9") below the finished grade of the road as shown on the contract drawing at each station.

The specifications provide that payment for rock excavation is to be based on the volume determined by allowing for the removal of rock six inches below the design grade elevations shown on the contract drawings and as staked. For our purpose the design grade elevations are considered synonymous with the finished grade elevations shown on the contract drawings.

The above determinations have been made with full knowledge that the quantity of rock removed cannot be accurately determined at this time and that accepted road design and construction practices, especially where rock excavation may be involved may not necessarily follow these determinations. Striving for accuracy in the circumstances is not our objective because it would not be possible to achieve. Our purpose is to arrive at a reasonable basis on which disposition of appellant's claim can be made, based on the record before us. This we have done.<sup>61</sup>

The record is clear that appellant performed work not required by the contract in excavating all of the rock below the roadbed and in backfilling the area with select material. No claim, as such, has been made for this work but to the extent appellant may anticipate that it is represented as part of his claim for rock excavation, it is denied on the grounds that it was voluntary work.<sup>62</sup>

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<sup>61</sup> The elevations used in computing the sectional area of the rock excavated at each station using Station 256+00 as an illustration was computed on the following basis:

The rock excavation in the roadbed extended three feet nine inches (3'9") below the finished grade of the road as shown on the contract drawings; the finished grade of the road at Station 256+00 as shown on the contract drawings is elevation 321.67 feet; the bottom of the rock excavation (appellant's cross-section) was therefore at elevation (321.67-3.75) 317.92 feet; the thickness of the rock excavated (appellant's cross-section) was five (5) feet; the top of the rock excavation (appellant's cross-section) was therefore elevation (317.92+5.0) 322.92 feet; the bottom of the clay base course of the road was six (6) inches below the finished road grade shown on the contract drawings or at elevation (321.67-.5) 321.17 feet; the area to be used in computing the volume of rock excavation on which payment would be made would be the rock between elevation 321.17 feet, the bottom of the clay base course of the road and elevation 322.92, the top of the rock or cross-section allowing for the ditch cut and bank slope shown on the road profile when superimposed on appellant's cross-sections.

The process was followed at each station. With the various elevations determined the volume of rock to be paid for was computed by the average end area method.

<sup>62</sup> *Paul C. Helmick Co.*, IBCA-39 (July 31, 1956), 63 I.D. 209, 56-2 BCA par. 1027; *Ray D. Bolander Company, Inc.*, IBCA-331 (November 16, 1965), 72 I.D. 449, 65-2 BCA par. 5224.

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*Conclusion*

The appellant is entitled to payment for 548.91 cubic yards of rock excavation at \$10 per cubic yard in the amount of \$5,489.10,<sup>63</sup> less the payment previously made for the volume involved at the contract price specified for common excavation of \$.20 per cubic yard<sup>64</sup> or \$109.78. Accordingly, the appeal is sustained to the extent that the appellant is awarded the sum of \$5,379.32.

ARTHUR O. ALLEN, *Alternate Member.*

I CONCUR:

I CONCUR:

DEAN F. RATZMAN,  
*Chairman.*

WILLIAM F. MCGRAW, *Member.*

### APPEAL OF MORRISON-KNUDSEN COMPANY, INC.

IBCA-553-4-66

*Decided November 18, 1966*

**Contracts: Disputes and Remedies: Jurisdiction—Contracts: Construction and Operation: Labor Laws—Rules of Practice: Appeals: Dismissal**

A construction contractor disputed a contracting officer's requirement that "Line Construction" classifications and pay scales be applied to workmen who assembled and erected steel transmission line towers, contending that it would be proper to utilize "Ironworker, structural" classifications and pay scales (workers in the latter classifications received lower rates of pay). Minimum wage rates for both classification types were incorporated in the contract under the Davis-Bacon Act. The Department of Labor upheld the contracting officer's ruling after considering the matter on two occasions and holding a hearing as part of its second review; in addition, the contractor asked for, and received, consideration (and reconsideration) of the dispute by the Comptroller General of the United States. The Comptroller General also concluded that the contracting officer's classification action was correct. In such circumstances, the Board declined to exercise jurisdiction over an appeal involving the same matter, referred to it under the "Disputes" clause of the contract, and entered an order of dismissal.

<sup>63</sup> Following is a comparison of the estimated quantities of rock claimed by appellant as shown on the cross-sections he prepared and those determined by the Board.

<i>Between Stations</i>	<i>Appellant's Estimate</i>	<i>Board Estimate</i>
255+50-256+00	208.33 cu. yds.	63.37 cu. yds.
256+00-257+00	833.33 cu. yds.	253.48 cu. yds.
257+00-258+00	727.77 cu. yds.	178.48 cu. yds.
258+00-259+00	494.44 cu. yds.	52.66 cu. yds.
259+00-260+00	244.44 cu. yds.	0.92 cu. yds.
260+00-261+00	194.44 cu. yds.	0
261+00-261+50	66.66 cu. yds.	0
<b>Totals</b>	<b>2,769.41 cu. yds.</b>	<b>548.91 cu. yds.</b>

<sup>64</sup> Tr. p. 156.

## BOARD OF CONTRACT APPEALS

Morrison-Knudsen Company, Inc. (the contractor), by letter dated April 6, 1966, pursuant to the "Disputes" clause of the above-designated contract, has appealed to the Board from the "Findings of Fact and Decision" issued by the contracting officer on March 1, 1966.<sup>1</sup>

The contractor's claim is for moneys withheld from contract earnings because of the contractor's asserted underpayment of wages to journeymen and their helpers engaged in assembly of transmission line towers on the ground and in the air. Morrison-Knudsen classified and paid these employees as "Ironworkers, structural" at \$3.91 per hour and "Mechanic's Helpers" at \$2.75 per hour, instead of the rates specified for "Lineman," at \$4.46 per hour and "Groundman" at \$3.22 per hour. Work on the contract was completed on September 30, 1964, and a total of \$74,606.31 was withheld from payments made to the contractor to assure reimbursement of the workmen allegedly underpaid.

The contract provides, in relevant part, as follows:

#### 6. DISPUTES

(a) *Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing \* \* \*.*

\* \* \* \* \*

The decision of the head of the agency or his duly authorized representative for the determination of such appeals shall be final and conclusive.

\* \* \* \* \*

In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of his appeal.

\* \* \* \* \*

(b) This Disputes clause does not preclude consideration of questions of law in connection with decisions provided for in paragraph (a) above. [Italics added.]

The contract further provides, in paragraph 13, for the minimum wages to be paid to workmen in accordance with the Davis-Bacon Act, as determined by the Secretary of Labor, as follows:

#### 13. Rates of Wages

Pursuant to the provisions of the Davis-Bacon Act, as amended (49 Stat. 1011; 40 U.S.C. 276(a)), the Secretary of Labor has determined that the following rates

<sup>1</sup> With certain exceptions specified in the regulations, the Board exercises generally the power of the Secretary of the Interior (the Secretary), in deciding appeals from "\* \* \* findings of fact or decisions by contracting officers of any bureau or office \* \* \*" (43 CFR-A-Part 4, Sec. 4.4(a), and its authority includes:

"The Board may, in its discretion, decide questions which are deemed necessary for the complete decision of the issue or issues involved in an appeal, including questions of law." (43 CFR-A-Part 4, Sec. 4.4(b).)

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of wages are the prevailing rates of wages for the classifications specified in the locality of the work covered by these specifications, and said rates of wages shall be the minimum rates per hour to be paid for the work covered by these specifications:

*Classification**Rate per hour*

(The classifications and wage rates will be furnished by supplemental notice before bids are opened.)

\* \* \* \* \*

Any class of laborers and mechanics not listed above, which will be employed on this contract, shall be classified or reclassified conformably to the foregoing schedule. *In the event the interested parties cannot agree on the proper classification or reclassification of a particular class of laborers and mechanics to be used, the question, accompanied by the recommendation of the contracting officer, shall be referred to the Secretary of Labor for final determination.* [Italics added]

The supplemental notice referred to was duly supplied under date of April 3, 1962.

The Government has filed a motion to dismiss the appeal for lack of jurisdiction, pointing out that the Comptroller General has already acted upon this matter, and contending that the Board does not have authority to review determinations of law made by the Comptroller General pursuant to his authority to settle claims against the Government.

In its response to the motion to dismiss, the contractor contends that its notice of appeal specifically appealed from the contracting officer's finding (paragraph 21) that the workmen in question should have been paid at the rates fixed by the Secretary of Labor for "Linemen" and "Groundmen," rather than at the rates fixed for "Ironworkers" and "Mechanic's Helpers," and urges that the appeal clearly raises a question of fact under the Disputes clause of the contract. The contractor further contends that the Board's authority is distinct from that of the Comptroller General, so that the Board does have jurisdiction, and is not bound by the adverse decision by the Comptroller General; and that the contractor has a contractual right to a decision by the Board.

This controversy had its origin in the award to the contractor on May 11, 1962, of a contract for the construction of a 230 kilovolt electric power transmission line about 180 miles long, from the site of the Bureau's Curecanti Substation, in Montrose County, Colorado, to the site of the Bureau's Hayden Substation, in Routt County, Colorado, traversing seven Colorado counties.

The contractor, on July 30, 1962, requested that approval be granted for the use of the classification and wage rate, "Tower Erector @ \$3.66." This request, which evidently related to labor to be used in the erection of steel transmission towers, was joined in by the International

Union of Operating Engineers, A.F.L.-C.I.O., Local No. 9, and by Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 13. The contractor represented that it had a valid collective bargaining agreement with both of those unions containing the classification and wage rate specified. (Exhibit 2.)

The request was denied by the project construction engineer (Exhibit 3). The contractor then informed the Bureau that men engaged in tower erection would be classified and paid as "Ironworkers, structural," at the rate of \$3.91 per hour, a classification and rate contained in the determination by the Secretary of Labor (Exhibit 4). The project construction engineer reiterated his earlier statement that the "Lineman" classification was the proper one, and suggested that the matter be referred to the Secretary of Labor for decision pursuant to Clause 13 of the contract, if the contractor should disagree (Exhibit 5). The contractor maintained its position, contending that imposition of the classification and wage rate required by the Bureau would be a change in the specifications (Exhibit 6).

The matter was then submitted to the Department of Labor by the Bureau (Exhibits 7 and 8), and the Solicitor of Labor affirmed the Bureau's previous administrative determinations (Exhibit 9). The contractor indicated its intent to protest the rulings (1) in the light of Comptroller General's decision B-147602 (1-23-63, unpublished), and (2) for the reason that the use of the "Structural Iron Workers" classification was in compliance with the specifications, since the only structural iron work under the contract was that of tower erection, and a contrary ruling would amount to a determination of union craft jurisdiction, in disregard of an existing labor agreement, and contrary to the Comptroller General's decision cited (Exhibit 11).<sup>2</sup> The contractor at this time suggested that that matter be heard informally by the Department of Labor.

The contractor then submitted certain material to the Department of Labor (Exhibits 12, 13 and 14), which in turn advised the Bureau that "no modification has been made of the views expressed in our April 10th opinion," and forwarded the material "\*\*\* for appropriate consideration by the Contracting Officer and for any further administrative action he may deem warranted." (Exhibit 15.) The Department of Labor also forwarded to the Bureau certain material submitted by the International Brotherhood of Electrical Workers (Exhibit 16). After consideration of the additional material, the contracting officer adhered to the previous determination and so advised the contractor, directing the contractor to classify its personnel

<sup>2</sup> It appears that in 1950 a bitter jurisdictional controversy between the International Association of Bridge, Structural and Ornamental Ironworkers and the International Brotherhood of Electrical Workers had been resolved by agreement granting jurisdiction to the latter for the erection of steel towers carrying transmission or distribution lines.

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in accordance with that determination, failing which withholding procedures would be instituted (Exhibit 17). Over the contractor's protest the contracting officer instituted withholding (Exhibits 18 and 19).

The contractor, on May 20, 1964, submitted a claim to the Comptroller General for reimbursement of all moneys withheld and requested that the Bureau be directed to refrain from further withholding, pointing out that the Department of Labor had taken no action on its request for a hearing (Exhibit 20).

Meanwhile, the Bureau had requested the Secretary of Labor to direct that a hearing be held pursuant to Section 5.11(b) of 29 CFR., Part 5, regulations of the Department of Labor, "\* \* \* since it had become evident that the Bureau and the Contractor could not reach agreement on the applicable wage rates." (Exhibit 23.) This hearing was held and evidence received from interested persons, although the contractor did not appear.<sup>3</sup> The hearing examiner's decision affirmed the previous determinations as to classification (Exhibit 24),<sup>4</sup> and no appeal was taken from that decision.

Work on the construction contract was completed on September 30, 1964, and the sum of \$74,606.31 was withheld from payments made to the contractor on the ground that it had improperly classified 206 employees. The contractor, in executing its release to the Bureau, excepted "\* \* \* the claim presently pending before the General Accounting Office for release of and payment to the contractor of \$74,606.31."

Following the Bureau's report to the Comptroller General (Exhibit 25), the latter rendered his decision in the matter on December 13, 1965 (Exhibit 26, Comp. Gen. Dec. B-154253, 12-13-65), reviewing the entire matter and denying the contractor's claim.

The contractor then signified its desire to have the matter considered by this Board under the Disputes clause of the contract and, following the issuance of the contracting officer's formal findings of fact and decision, filed this appeal under date of April 6, 1966.

The gravamen of the appeal is as follows:

Specifically, appellant disagrees with the findings set forth in paragraph 21 of the contracting officer's Decision in which it is concluded that journeymen and helpers engaged in assembling of towers on the ground and in the air should be classified and paid as "Linemen" at \$4.46 per hour, and "Groundmen" at \$3.22 per

<sup>3</sup> The Department of Labor's hearing examiner states in his decision (Exhibit 24) that "all interested parties were invited to participate" and that "Morrison-Knudsen by letter to the Solicitor of Labor dated June 23, 1964, from its counsel, gave notice that it would not participate in the proceeding."

<sup>4</sup> The Department of Labor's hearing examiner determined that "the prevailing practice in the counties listed in the Notice of Hearing—and indeed in nearby geographical areas—was to pay wages to workmen engaged in the assembly and erection of transmission line steel towers on the basis of 'Line Construction' classifications set forth in the Labor Department's wage predetermination."



hour rather than at the "Ironworkers" and "Mechanics Helpers" rates paid by the contractor. Appellant also disagrees with the conclusion of the contracting officer in paragraph 22 that the withholding of funds for underpayment of employees as set forth in paragraph 10 is proper.

Meanwhile, the contracting officer notified the contractor that in accordance with section 3 of the Davis-Bacon Act and the request of the acting Comptroller General to the Secretary of the Interior, he intended in due course to transmit the moneys withheld to the General Accounting Office for distribution to the affected employees (Decision, paragraph 20). The contractor sought reconsideration by the Comptroller General, and by letter dated September 9, 1966, the Acting Comptroller General, on reconsideration, sustained denial of the contractor's claim.

*Statement of, and Reasons for, the Decision*

The motion to dismiss is granted. Proper disposition of this appeal requires an evaluation of the law and authorities applicable to the separate but co-ordinate functions of the Department of Labor, the Comptroller General of the United States, and this Board, with respect to the contract in question and to enforcement of the Davis-Bacon Act, *supra*.

We have discussed the jurisdiction of the Board in footnote 1, *supra*.

Under the Davis-Bacon Act, contracts entered into by the United States for the construction of public works having any significant cost

\* \* \* shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State \* \* \* in which the work is to be performed \* \* \* (40 U.S.C. sec. 276a).

The same section of the statute provides that the contract shall contain:

\* \* \* the further stipulation that there may be withheld from the contractor so much of accrued payments as may be considered necessary by the contracting officer to pay \* \* \* the difference between the rates of wages required by the contract \* \* \* and the rates of wages received \* \* \*.

The contract in this case contains provisions to this effect. Enforcement provisions of the statute include the Government's right to terminate upon a finding by the contracting officer of violation (40 U.S.C. sec. 276a-1), and authority of the Comptroller General to pay directly to laborers and mechanics wages due them, from amounts withheld under the contract (40 U.S.C. sec. 276a-2).

Reference has already been made to the governing provisions of the contract, clause 6 of the "General Provisions," paragraphs 1 and 6 of the "Labor Standards Provisions" and paragraph 13 of the "Specifications," "Special Conditions."

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In this case, the contract included a schedule of classifications and minimum wage rates determined by the Secretary of Labor, pursuant to paragraph 13 cited above (Specifications No. DC-5760, Supplemental Notice No. 1, Denver, Colorado, April 3, 1962). Among these were "Ironworkers, structural," "Line Construction: Lineman," "Line Construction: Groundman," and "Power Equipment Operators: Helpers (mechanics and welders)."

The Davis-Bacon Act "\* \* \*" was not enacted to benefit contractors, but rather to protect their employees from substandard earnings by fixing a floor under wages on Government projects. Congress sought to accomplish this result by directing the Secretary of Labor to determine, on the basis of prevailing rates in the locality, the appropriate minimum wages for each project. *The correctness of the Secretary's determination is not open to attack on judicial review*" (*U.S. v. Binghamton Construction Co.*, 347 U.S. 171, at 177 (1954); italics added; footnotes omitted).

Although the rationale of this decision has been criticized, it has been conceded that:

At the very least a wage determination of the Secretary of Labor accurately incorporated in the contract in accordance with his regulations should not be subject directly or indirectly to judicial review. (Speck, 23, Geo. Washington L. Review 249, at pp. 269-270).

Notwithstanding the criticism, however, the Supreme Court has very recently referred to the *Binghamton* case with apparent approval.<sup>5</sup>

The Court of Claims has likewise held that a wage-rate determination by the Secretary of Labor made on a reference by the contracting officer pursuant to 29 CFR sec. 5.11 (now 29 CFR sec. 5.12; promulgated pursuant to the Davis-Bacon Act and Reorganization Plan No. 14 of 1950, 5 U.S.C. sec. 133z-15, note, at p. 208) is final, and not subject to judicial review.<sup>6</sup>

The Armed Services Board of Contract Appeals has also had occasion to pass upon the question of its authority to review wage classifications as finally determined by the Secretary of Labor pursuant to the Davis-Bacon Act. In *Grannis and Sloan, Thompson, Street, and Wattinger Company*, ASBCA No. 4968, 59-1 BCA par. 2213, the Board held that it was without jurisdiction to review such determinations. See also *John M. Bragg, t/a the Bering Co.*, FAACAP No. 66-3, 65-2 BCA par. 5001 (Davis-Bacon wage classification determinations are "solely for the Labor Department whose action is conclusive upon the contracting officer and the Federal Aviation Agency," quoting from the unreported case of *Wickes Engineering & Constr. Co.*).

<sup>5</sup> See *United States v. Grace & Sons, Inc.*, 384 U.S. 424, 425 (1966), footnote 1.

<sup>6</sup> *Nello L. Teer Company v. The United States*, 172 Ct. Cl. 255, 348 F. 2d 533 (1965), cert. den., 383 U.S. 934.

The functions of the Comptroller General are also of importance in this appeal. The authority of the Comptroller General derives from 31 U.S.C. sec. 71, conferring upon the General Accounting Office the authority to settle and adjust all claims by or against the United States, and from 31 U.S.C. sec. 74, making the "Balances certified by the General Accounting Office, upon the settlement of public accounts, \* \* \* final and conclusive upon the Executive Branch of the Government \* \* \*" subject to certain qualifications, as well as from section 3 of the Davis-Bacon Act (40 U.S.C. sec. 276a-2) authorizing him to pay directly to the persons affected amounts withheld by the contracting officer to cover underpayments under the statute. The Comptroller General has held, with respect to the functions of the Secretary of Labor under the Davis-Bacon Act, that " \* \* \* the Secretary's function is exhausted once he has furnished \* \* \* a wage determination and a schedule based thereon has been included in a contract specification \* \* \* but he has a continuing interest in the interpretation and enforcement of wage determinations pursuant to the provisions of Reorganization Plan No. 14 of 1950, 5 U.S.C. secs. 133z-15, which empower him to prescribe 'appropriate standards, regulations and procedures' governing the enforcement activities of the various contracting agencies \* \* \*."

In view of the Comptroller General, the enforcement and administration functions with respect to labor standards were not transferred to the Secretary of Labor by Reorganization Plan No. 14 of 1950, *supra*, but remain vested in the contracting agencies. Accordingly, the Comptroller General seems to regard the Department of Labor's further functions as advisory only, in the interest of consistent enforcement of the classifications and wage rates promulgated by it; the contracting officer is considered to possess the authority to determine whether proper classifications and wage rates have been assigned, to direct payment of the proper wages, and to withhold funds to cover underpayments; and the General Accounting Office has the final and sole responsibility to make wage adjustments and to determine violations of the Davis-Bacon Act.<sup>8</sup>

Finally, the function of the boards of contract appeals of the various contracting agencies should be commented upon. The tendency of the boards has been to determine that a dispute as to the propriety of a classification, at least in cases in which the contracting officer has ruled that withholding of payment to the contractor is required, necessarily involves a finding of fact by the contracting officer, viz., that some employees have not been paid at the applicable rate specified in the

<sup>7</sup> Comp. Gen. Dec. B-147602, 1-23-63, unpublished, the so-called *Orangeburg Duct* case.

<sup>8</sup> Comp. Gen. Dec. B-154253 (December 13, 1965), Exhibit 26, pp. 5-6; Comp. Gen. Dec. B-14702 (January 23, 1963), unpublished; Comp. Gen. Dec. B-145009, 40 Comp. Gen. 557, at 561; Comp. Gen. Dec. B-144901, 40 Comp. Gen. 565, at 570; and see 7 McBride & Wachtel, *Government Contracts*, Sec. 45.50 (10), notes and comment.

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contract, and that the contracting officer's decision on this question of fact is appealable to a board of contract appeals. This view is reached by a somewhat technical construction of the language of the usual wage rate provision of the contract, comparable to the language used in this case, paragraph 13, Specifications, Special Conditions. Decisions to this general effect appear to occur in cases in which there has been no referral, as here, to the Department of Labor, and no determination, as here, by the Comptroller General.<sup>9</sup>

Against this background of authority, we can view the contractor's claim in better perspective. What does the contractor seek from this Board? The Notice of Appeal dated April 6, 1966, asks for review of the contracting officer's findings of fact, paragraph 21, the ultimate finding as to classification, and his conclusion as to the propriety of withholding, paragraph 22, both quoted *supra*. No reason is assigned as to why either is deemed erroneous by the contractor, as called for by 43 CFR Part 4, sec. 4.5. We note, in particular, that the contractor fails to suggest in its Notice of Appeal that it has available to it any evidence of a factual nature, not previously furnished to the Department of Labor (it did not appear at the hearing held by that Department), the contracting officer and the Comptroller General, upon which it relies to support its attack upon the findings and decision of the contracting officer. Absent such a statement, the Board must assume that the contractor's attack upon the propriety of the ultimate determination made is founded almost entirely upon its view that the statute had been misapplied.

Review of the prior proceedings in this matter, as set forth above, will indicate the factors which, in the Board's opinion, warrant dismissal of this appeal.

The Board attributes some significance to the contractor's initial position, reflected in its request that an additional classification, "Tower Erector," be established, and to the fact that the contractor requested the use of the classification, "Ironworkers, structural" only following the ruling by the project construction engineer (the contracting officer's duly authorized representative) that the classification and wage rate for "Lineman," included in the predetermination of wage rates by the Secretary of Labor, were applicable. This ruling was made August 29, 1962.

When the contractor continued to insist upon its position, having simply reassigned the work in question to classifications included in the

<sup>9</sup> *Appeal of Lee Electric Co., Inc.*, ASBCA No. 8332 (September 19, 1963), 1963 BCA par. 3884; *Linoleum Specialty Shop, Inc.*, ASBCA Nos. 3529 and 3530 (February 26, 1959), 59-1 BCA par. 2099 (on reconsideration); *J. R. Clanchette*, ASBCA No. 4508 (October 18, 1960), 60-2 BCA par. 2814; *Conway Electric Co.*, ASBCA No. 6256 (March 23, 1961), 61-1 BCA par. 2991; and see discussion, 7 McBride & Wachtel, *Government Contracts*, Sec. 45.50 (10).

original schedule, the matter was submitted by the Bureau of Reclamation to the Department of Labor for final decision in accordance with paragraph 13 of the contract specifications. The Solicitor of Labor concurred in the administrative decision by the contracting officer and the contractor, having been so advised, requested that the matter be discussed before the Department of Labor. Following the institution of withholding procedures by the contracting officer, a hearing was held (as sought by the contractor), before the Department of Labor. The contractor did not appear at this hearing, held pursuant to section 5.11(b) of 29 CFR Part 5. The hearing examiner, after hearing the evidence, concurred in the previous determinations, and his decision became final.

Under the views expressed by the United States Supreme Court, the United States Court of Claims, and the Department of Labor, this determination should be treated as binding upon the executive branch of the Federal Government.

We have also discussed in detail the fact that, upon its own initiative, the contractor has obtained review by the Comptroller General of its position in this case, and reconsideration of that review, and both times has been unsuccessful.

The contractor, in effect, now asks the Board to overrule (1) the original administrative ruling by the contracting officer of August 29, 1962; (2) the original ruling of the Solicitor of Labor, April 10, 1963; (3) the decision of the hearing examiner of the Department of Labor, September 25, 1964, which became final; and (4) the decision of the Comptroller General, December 13, 1965, reiterated upon reconsideration at the contractor's request, September 9, 1966.

This we decline to do. In the circumstances narrated above it is appropriate that we defer to the rulings heretofore made by the Department of Labor and the Comptroller General.<sup>10</sup>

### *Conclusion*

For the reasons stated, we shall not review the merits of this appeal and it is finally dismissed.

ALFRED P. WHITTAKER, *Alternate Member.*

I CONCUR:

I CONCUR:

DEAN F. RATZMAN, *Chairman.*

WILLIAM F. MCGRAW, *Member.*

<sup>10</sup> For discussions of the effect of referral of a question to the Comptroller General upon the contractor's initiative, see *Reid Contracting Company, Inc.*, IBCA-74 (December 19, 1958), 65 I.D. 500, 58-2 BCA par. 2037; *Richard J. Neutra & Robert E. Alexander*, IBCA 408 (October 16, 1964), 1964 BCA par. 4485.

## STANLEY C. HAYNES

A-30630

*Decided December 2, 1966***Mining Occupancy Act: Generally—Words and Phrases**

The term "improvements" includes any structures of a permanent nature placed upon land which tend to increase the value of land but excludes a house trailer or other mobile property which is not permanently affixed to the land.

**Mining Occupancy Act: Qualified Applicant**

A qualified applicant for conveyance of land under the act of October 23, 1962, must have been, on that date, a residential occupant-owner of valuable improvements in an unpatented mining claim which constituted for him a principal place of residence, and where there were not, on that date, improvements on the land suitable for residence, an applicant is not qualified under the act, and his application is properly rejected.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Stanley C. Haynes has appealed to the Secretary of the Interior from a decision dated March 7, 1966, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed a decision of the Colorado land office rejecting his application Colorado 0120811, filed pursuant to the act of October 23, 1962, 76 Stat. 1127, 30 U.S.C. §§ 701-709 (1964), to purchase a tract of land in the former unpatented Ethelyn lode mining claim in secs. 26 and 27, T. 3 S., R. 74 W., 6th P.M., Colorado.

The appellant filed his application on March 9, 1964, stating that he located the Ethelyn claim in 1938, that he built a 3-room frame cabin on the claim in the spring of 1939 which has been his home since that time, that, although he was gone from 1941 to 1955 on defense work, he always maintained a home on the mining claim and spent all his vacations there during the 14-year period, and that he returned to the mining claim site in April 1955 and has resided there continuously since that date. He further stated that his cabin burned down on June 5, 1962, that he did not get enough insurance to rebuild so he bought "a beat-up mobile home and renovated it," and that he has now advertised the mobile home for sale and will have enough money to rebuild on his original cement slab as soon as he sells it.

By a decision dated December 6, 1965, the land office rejected the application upon findings that the appellant and his wife have resided in Denver and Lakewood, Colorado, since 1958, that appellant's occupancy of the claim has been only sporadic, especially since 1958, and that the trailer house which he moved onto the claim after his house burned was not a qualifying improvement under the act, *supra*.

In his appeal to the Director, Bureau of Land Management, Haynes stated that the mining claim site was his home from May 1955 to

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June 1958 without interruption and that, while his wife rented an apartment in Denver in 1958 because of her employment there, it was only his wife who resided in Denver while he continued to reside on the mining claim except for weekends, holidays and periods of extremely cold weather.

The Office of Appeals and Hearings, noting that the only "improvements" shown on the claim were the mobile trailer house which the appellant moved onto the claim shortly after his cabin was destroyed in 1962<sup>1</sup> and a corrugated iron shed which was not placed on the claim until 1964, concurred in the findings of the land office that the trailer house does not constitute a valuable improvement within the meaning of section 2 of the act of October 23, 1962, 76 Stat. 1127, 30 U.S.C. § 702 (1964), and that the appellant's brief periodic visits to the mining claim from the latter part of 1958 until October 23, 1962, did not establish the claim as a principal place of residence for the appellant on the latter date.

In his present appeal the appellant asserts that he sleeps four nights of the week at the mining claim site and three nights in Denver, that he could never call an apartment his home, regardless of who lived there, and that he also has his shop at the mining claim and uses the claim as the base for his fishing and hunting activities in season. He further asserts that his trailer "is no longer a 'beat up' deal after \$300 worth of work and material," that it is a comfortable home with wall-to-wall carpeting, and that, while it "may not be considered 'valuable improvements' by some," to him "it is mighty valuable."

Assuming for the moment, but not deciding, that the appellant's use of the mining claim site from 1955 until the destruction of his cabin in June 1962 established the cabin as a principal place of residence for him during that period, the question remains as to whether or not the appellant was, on October 23, 1962, "a residential occupant-owner \* \* \* of valuable improvements in an unpatented mining claim."<sup>2</sup> Vital to that determination, of course, is the question as to whether appellant's trailer house is a "valuable improvement," and the question here is not whether it is "valuable" but whether it is an "improvement."<sup>3</sup>

The term "improvements" is defined in the Bureau's *Glossary of*

<sup>1</sup> The Office of Appeals and Hearings inadvertently referred to the destruction of the cabin "in June 1958." (Italics added.)

<sup>2</sup> In order to qualify for relief under the act an applicant must have been

"a residential occupant-owner, as of October 23, 1962, of valuable improvements in an unpatented mining claim which constitute for him a principal place of residence and which he and his predecessors in interest were in possession of for not less than seven years prior to July 23, 1962." 76 Stat. 1127 (1962), 30 U.S.C. § 702 (1964).

<sup>3</sup> The record does not disclose how soon the trailer was moved onto the mining claim after the destruction of the cabin or whether the trailer was on the claim on October 23, 1962. For the present, however, it will be assumed that whatever residential use may have been made of the trailer was, in time, substantially a continuation of the use made of the cabin.

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*Public Land Terms* as "[s]tructures or developments of a permanent nature which tend to increase the value of land, such as buildings, fences, clearing, wells, etc." (Italics added.) This definition is in accord with standard definitions of the term.<sup>4</sup>

In explaining the language of the bill which ultimately became the act of October 23, 1962, the Senate Committee on Interior and Insular Affairs stated that:

The term "valuable improvements" is intended to include a presently habitable residence which has been used for this purpose, plus other accessory buildings incidental to residence, such as a tool shed, garage, barn, or chickenhouse presently fit for use. S. Rept. No. 1984, 87th Cong., 2d Sess. 7 (1962).

The explanation thus given does not suggest a different meaning for "improvements" from that which is ordinarily to be understood. It merely emphasizes that the "valuable improvements" which qualify an applicant under the act must include a structure which is suitable, and has been used, for residence and that the improvements must be presently fit for use. The "habitable residence," then, must be a permanent building which tends to increase the value of the land.

It is, perhaps, not possible to state categorically whether or not a mobile trailer home may be considered an improvement. In this connection, it is noted that some State statutes have classified house trailers, or mobile homes, as real property for tax purposes. Other statutes provide for the taxation, as real estate, of house trailers permanently attached to the land, and it has been held that, in determining the applicability of such legislation to a particular trailer, the question of the permanency of attachment is determined by the intention of the parties as indicated by a consideration of all the circumstances. Some statutes provide for taxation, as realty, of buildings and other structures erected upon the land, but do not specifically mention trailers or mobile homes, and it has been held that, in order to bring these within the contemplation of such statutes, there must be evidence indicating an intention on the part of the owner thereof to affix them permanently to the land.<sup>5</sup> See 51 Am. Jur., 1966 Supp., *Taxation* § 416.

<sup>4</sup> "Generally speaking, the word 'improvement' may be said to include everything that enhances the value of premises permanently for general uses. It includes not only buildings and fixtures, but also many other things which are not buildings or fixtures. Among the most common illustrations of improvements may be enumerated the erection of a building, the replacing of old buildings with new ones, the making of substantial additions or changes in existing buildings, the erection of fences or of a necessary sidewalk alongside property, the digging of wells thereon, or the planting of a fruit orchard." 27 Am. Jur. *Improvements* § 2.

"\* \* \* The term 'improvement' is sometimes used with reference to personal property, \* \* \* but ordinarily it is employed in the plural form, and with reference to real property only \* \* \*." 43 C.J.S. *Improvements* § 1.

See *Virgil H. Menefee*, A-30620 (November 23, 1966).

<sup>5</sup> We note here that in Colorado trailer houses are classified and taxed as motor vehicles and that they are not listed as items of real property. See Colo. Rev. Stat. 1963 §§ 12-1-1 (10), 13-3-4, and 137-1-2.



While the classification of a trailer house as real property for tax purposes, even if uniformly followed in all jurisdictions, would not necessarily lead to the conclusion that the trailer is an improvement within the meaning of the act of October 23, 1962, the criteria generally applied in determining the nature of the property in the first instance would appear to be applicable in determining its nature in the latter case. Thus, while it would seem obvious that moving a trailer house onto a tract of land does not, *per se*, constitute improvement of the land, we think it is equally clear that a trailer house may, by use and intent, be permanently affixed to the land in such a manner as to become an improvement.

There are, in the present case, certain factors which could suggest appellant's intent permanently to affix the house trailer to the land, notably, the period of time over which the trailer has been left on the mining claim without being moved (presumably since sometime in 1962) and the connection of the trailer to a cesspool or septic tank and, through a meter, to electricity. On the other hand, the electrical and sanitary connections are not necessarily indicative, in themselves, of permanent attachment, for it does not appear that any problem would be encountered in disconnecting them. Moreover, it appears that the trailer has been set on blocks which do not constitute a permanent foundation and that it can readily be made mobile again by replacing the wheels and removing the blocks.<sup>6</sup> Finally, the appellant stated in his application that "I now have \* \* \* [the trailer] advertised for sale and as soon as I sell it, I will have money enough to rebuild on my original cement slab," thus, precluding a finding that he intended the trailer to become a permanent structure on the land. The evidence as a whole, then, does not warrant the conclusion that appellant's trailer has become a part of the realty; therefore it does not constitute a "valuable improvement" within the meaning of the act, *supra*.

As we have noted, it does not appear that the right to the use of the land is essential to appellant's control over, or use of, his trailer house, for it appears that he has already contemplated the removal and sale of the trailer house. What appellant, in fact, appears to seek is simply a site upon which he can build in the future or which he can sell. The act does not extend to the granting of this form of relief.<sup>7</sup>

<sup>6</sup> We note here that the question of realty or personality is not one solely of the physical possibility of removal, for it is not infrequent that an entire house is removed from a permanent foundation to be set down elsewhere. Technically, perhaps, all improvements to real property may be removed in one form or another. The ultimate question is one of intent and design. Did the owner intend the particular property to become a permanent part of the realty, and, if so, is the property suitable for that purpose?

<sup>7</sup> Cf. *Arthur Baker et al., Skrametti Realty Co.*, 64 I.D. 87. (1957), in which the Department held that an applicant for land under the Color of Title Act, 45 Stat. 1069 (1928), as amended, 43 U.S.C. § 1068 (1964), could not, in attempting to show that "valuable improvements" had been placed upon the land, rely on improvements which had been destroyed before the applicant acquired his interest in the land or on improvements which the applicant himself constructed after he learned that he did not have good title to the land.

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Accordingly, the Bureau properly found that the appellant is not a qualified applicant under the act, and it becomes unnecessary to determine the validity of the second basis for the Bureau's action, *i.e.*, that the claim site was not a principal place of residence for the appellant after 1958.

It appears from the record that Bureau of Land Management personnel have discussed with the appellant the possibility of permitting him to remain temporarily on the land under some type of permit or lease but that the appellant has indicated no interest in such an arrangement. It should be pointed out here that even if the appellant were found to be a qualified applicant under the act of October 23, 1962, *supra*, he would not necessarily be entitled to receive a fee patent to the land, for the act leaves to the discretion of the Secretary the determination as to whether the granting of a fee patent or a lesser estate or no estate at all is appropriate in a particular situation (see 76 Stat. 1127 (1962), 30 U.S.C. § 701 (1964); S. Rept. No. 1984, *supra*, at 5). If appellant's continued occupancy of the mining claim site as a trailer site is compatible with Bureau plans for use or development of the area, and if the appellant desires to continue his occupancy under such terms as the Bureau may offer, there is no objection to his continued use of the site, but the appellant has not demonstrated any right to receive title to the land which he seeks or to continue his occupancy if the land is needed for other purposes.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A (4) (a); 24 F.R. 1348), the decision appealed from is affirmed.

ERNEST F. HOM,  
Assistant Solicitor.

### APPEAL OF C. W. "BILL" LAMB

IBCA-397

Decided December 29, 1966

**Contracts: Performance or Default: Excusable Delays—Contracts: Disputes and Remedies: Termination for Default—Contracts: Disputes and Remedies: Burden of Proof**

Under a contract for the performance of survey work the contracting officer properly terminated the contract for default where the weight of the evidence supported a conclusion that following the receipt of letters warning the contractor to comply with the performance schedule, the contractor abandoned the work after a series of delays, due in part to Government error but caused principally by inadequate performance and financial difficulties.

### Contracts: Disputes and Remedies: Termination for Default—Contracts: Disputes and Remedies: Burden of Proof

Following a termination for default the Government failed to sustain its burden of proof as to mitigation of damages and reasonableness of the assessment of excess costs, where because of urgent requirements the work of completion was divided and performed by the Government and two other contractors simultaneously, instead of by the presumably less costly method of completion by the two next low bidders on the original procurement.

#### BOARD OF CONTRACT APPEALS

This is an appeal from a default termination and from an assessment of excess charges in the net amount of \$18,538.64, representing the additional cost of completion of the work by others. The bid of C. W. "Bill" Lamb, the appellant, who was awarded the above-captioned contract, was \$36,175. The award was made to Mr. Lamb on March 14, 1963, after disqualification of a lower bid in the amount of \$34,908.28 due to the failure of that bidder to submit a bid bond. Because the Government's estimate was \$65,790,<sup>1</sup> the Government's representatives questioned Mr. Lamb by telephone prior to award with respect to the possibility that his bid was too low. Mr. Lamb replied in substance that he was familiar with the area to be surveyed, being a former employee of the Bonneville Power Administration and that he and his top personnel had spent considerable time in analyzing and evaluating the project and in preparation of the bid. Mr. Lamb stated that he considered that his bid price was fair and that it included a reasonable profit.

The contract was executed on Standard Form 33 and included Standard Form 32 (September 1961 edition). It required the performance of 7 separate pay items of work at unit bid prices and estimated quantities as set forth below:

Item No.	Supplies or services	Quantity	Unit	Unit price	Amount
1	Preliminary line----	15	Mile-----	\$176	\$2, 640
2	Located line-----	42	-----do-----	325	13, 650
3	Profile levels-----	42	-----do-----	145	6, 090
4	Property ties-----	20	-----do-----	176	3, 520
5	Structure site surveys.	340	-----do-----	18	6, 120
6	Access road location.	8	-----do-----	285	2, 280
7	Access road trace- ment.	15	-----do-----	125	1, 875
					<hr/> \$36, 175

<sup>1</sup> Of eight bids received, four were higher and four were lower than the Government's estimate.

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As a part of the consideration for the items described above, supporting data, maps, drawings and other materials and facilities, were to be provided by the contractor as set forth in "Part III—Technical Provisions of the Contract." Partial payments for such items were dependent upon the submission and acceptance of a "plan hard copy map," showing the plotting of all required data and with all notes, computations, drawings and other supporting data as to Items 1, 2, 4, 6 and 7. As to Items 3 and 5, payment was to be made at the stipulated unit prices upon submission and acceptance of applicable drawings and surveys with notes, computations and other supporting data. These requirements were prescribed in Part III, paragraph 3-106, with respect to each of such Items 1 through 7.

All work was required to be completed within 150 calendar days from receipt of notice to proceed. That notice was effective April 1, 1963, hence, the required completion date was August 28, 1963. Liquidated damages in the sum of \$100 per day were assessable for each day of delay.

The standards of accuracy required were those set forth in the BPA Contract Survey and Mapping Manual, referenced in the contract. As to the survey line the margin of error of closure could not exceed 1 foot in every 5,000 linear feet of line. A previous survey that had been made nearby for the purpose of establishing control points and coordinates was required to meet, and did meet, an even higher standard, 1 foot in 25,000.

The term "closure" relates to the difference between known (or "true") locations and observed locations of points along the survey line. From the prior survey of much higher accuracy just mentioned, "true" locations of points near the survey line have been established. In the Lamb contract, these were points "Ash," "Birch," "Cedar," etc., and the Port Angeles substation. At each of these points, coordinates have been calculated which give the distance east and north from distant base lines. The east coordinates are designated "X." The north coordinates are designated "Y." The coordinates of all angle points along the line being surveyed are calculated by trigonometry, working from the x and y coordinates of the control points. Again by means of trigonometry, computations form a closed geometric figure including the control tangent (the line, for example, between "Ash" and "Birch") as one side, and the angle segments of the line being surveyed forming the other sides.

The closed figure established by computations exists only on paper. It is established on the ground by measuring angles with a transit and measuring distances with a steel tape held under about 20 pounds tension. Throughout this operation of transferring the "true" distances and angles of the paper calculation to the ground, error may be

introduced. The tape may be held under too little or too much tension. The transit can be read with only limited accuracy. It may be out of focus. A blunder can be made in reading either the tape or the transit.

### *The Termination for Default*

As required by the contract, Mr. Lamb furnished to the Government by memorandum dated April 5, 1963, a schedule of proposed performance consisting of the estimated dates when the first series of "Hard-shell" (Hard copy map) would be submitted for inspection, acceptance and payment:

May 1st. To the 2d angle point in mile 6 near B.P.A. station BIRCH.

June 1st. To the angle point in mile 14 near B.P.A. station DOGWOOD.

July 1st. To the angle point in mile 23 near B.P.A. station ELM.

After experiencing a number of difficulties, including those caused by Government error in coordinates for the Port Angeles substation, inexperienced personnel, lack of proper supervision and insufficient working capital, Lamb withdrew his forces from the project on June 23, 1963, because a loan he was expecting "failed to materialize." (Tr. 69) The contract was terminated for default on July 3, 1963, pursuant to the terms of Clause 11 of the contract entitled Default.<sup>2</sup> Warning letters had been mailed to the contractor on May 24 and June 11, 1963, complaining of unsatisfactory progress.

Lamb attributes nearly all of the difficulties and delays in his performance of the contract to the Government's error in the coordinates for the substation. According to the Government, the delay that resulted from the Government's error was only a minor part of the

<sup>2</sup>The pertinent terms of the Default Clause are as follows:

"11. DEFAULT

"(a) The Government may, subject to the provisions of paragraph (c) below, by written notice of default to the Contractor, terminate the whole or any part of this contract in any one of the following circumstances:

"(1) if the Contractor fails to make delivery of the supplies or to perform the services within the time specified herein or any extension thereof; or

"(11) if the Contractor fails to perform any of the other provisions of this contract, or so fails to make progress as to endanger performance of this contract in accordance with its terms, and in either of these two circumstances does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure.

"(b) In the event the Government terminates this contract in whole or in part as provided in paragraph (a) of this clause, the Government may procure, upon such terms and in such manner as the Contracting Officer may deem appropriate, supplies or services similar to those so terminated, and the Contractor shall be liable to the Government for any excess costs for such similar supplies or services: *Provided*, That the Contractor shall continue the performance of this contract to the extent not terminated under the provisions of this clause.

"(c) Except with respect to defaults of subcontractors, the Contractor shall not be liable for any excess costs if the failure to perform the contract arises out of causes beyond the control and without the fault or negligence of the Contractor. Such causes may include, but are not restricted to, acts of God or of the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather; but in every case the failure to perform must be beyond the control and without the fault or negligence of the Contractor. \* \* \*

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over-all delays that were due to errors by Lamb's work force. Hence, in order to determine the relative merits of the positions of the parties, it is necessary that we examine Lamb's performance in detail.

The first segment of the Port Angeles-Sappho line run by Lamb was between control point "Ash" and the Port Angeles substation. Lamb ran preliminary and located line from the substation end to point "Ash." (Lamb, Tr. 188). He failed to close by approximately 32 feet. (Probasco, Tr. 283). The reason for this error of closure was that the Government-furnished coordinates for the substation were in error. (Memorandum to Hayward from New dated May 31, 1963, Lamb, Tr. 40, 41.) In fact, the error had been discovered between two angle points surveyed before the "tie" into control point "Ash." It first appeared April 21, while Lamb's crew reached "Ash" on April 25. (Probasco, Tr. 364).

The contractor expended considerable effort before it was established that the reason for the failure of the line to close was because the substation coordinates were in error rather than because of some mistake by Lamb's crew (Probasco, Tr. 287). It was not until May 26, 1963, that Lawrence O. New (Civil Engineer on the project) reported to H. A. Hayward (contracting officer's representative) that the substation coordinates were in error (memorandum to H. A. Hayward from New dated May 31, 1963).

Originally, when asked for an estimate of the time lost in rechecking the survey work because of the Government error, Mr. Lamb made a claim based on two weeks of delay as set forth in his letter of June 28, 1963, confirming his oral estimate made at a meeting on June 17, 1963 (memorandum dated June 18, 1963, Stewart to Diamond, Appeal File). At the hearing in reply to a question by the Hearing Official, Mr. Lamb first testified (Tr. 45) that: "My best estimate is approximately three weeks."

This estimate was repeated on further questioning by appellant's counsel, as follows:

Q. Well, up to this period of May 8, 1963, Mr. Lamb, up to that point, how much time did you actually spend doing the initial work under the contract and how much time would you say you spent retracing and re-doing the work at the direction of Mr. Hayward?

A. Well, of the approximately six weeks involved, I would estimate that three weeks had been spent in productive work and three weeks in retracing and search.

Mr. Lamb testified further (Tr. 47, 48) (although he was not present on the job most of the time) that between May 8 and May 24, 1963, the Government did not allow the contractor's forces to proceed with the work. His superintendent, Mr. Probasco, testified to the same effect. However, the more convincing evidence is to the effect that any delays

or stoppages, in excess of the two to three weeks that were devoted to rechecking the Government's error, were caused by the inexperience and frequent errors of the contractor's crews. As a result they were delayed and were unable to "close" on their own work in areas that were unaffected by Government error.<sup>3</sup> In one instance, there was a stoppage due to the contractor's failure to obtain permission from a landowner to proceed across land at the Elwha River, near control point "Birch." It is clear to the Board that the contractor would have been entitled to no more than three weeks' additional time for completion of the contract.

Accordingly, it appears that the first six miles of "hardshell" map should have been completed and submitted on or before May 22, 1963, rather than on May 1, 1963, as had been planned in Mr. Lamb's schedule, but this was never accomplished. The contractor's consequent inability to obtain a partial payment would not have affected subsequent performance, however, as alleged by Lamb. All rights to payment under the contract had been assigned to a bank as security for a loan which was to furnish working capital for performance of the contract.

Mr. Lamb's letter of June 28, 1963,<sup>4</sup> to Mr. L. C. Stewart, Head, Procurement Section, Bonneville Power Administration, reads as follows:

DEAR MR. STEWART:

Due to unforeseen delays in my financing, I have been forced to lay-off my personnel on the above project for a period of three (3) weeks. The men are unable to wait this length of time for their pay and must find other income producing pursuits for the period, but are willing to return at that time.

After a period of approximately three (3) weeks, my financing will again be firm and I can complete the project. It will undoubtedly not be completed within the contract time.

Please address all future correspondence to:

2785 No. Speer Bldg.  
Denver 11, Colorado

Very truly yours,

C. W. "BILL" LAMB,  
*Consulting Engineer.*

(Signed) C. W. Lamb,  
C. W. LAMB.

The import of the above-quoted letter was that Mr. Lamb would be unable to resume work until about July 22, 1963 (a Monday). At

<sup>3</sup>The contractor's allegation that there was a second Government error in coordinates that caused a failure to close by 9 feet at control point "Birch" was not borne out by the evidence. A BPA force account crew ran a traverse between "Ash" and "Birch" and obtained a closure of better than 1 in 12,000 (affidavit of L. O. New). See testimony of Williams, Tr. 794-5, and Nelson, Tr. 686, 688.

<sup>4</sup>Mr. Lamb wrote two letters dated June 28, 1963, to BPA. The other letter, referred to *supra*, set forth his claim for 2 weeks extension of time because of extra work due to Government error.

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this point the required date for completion of the work was September 18, 1963 (allowing an extension of three weeks for the Government's error as discussed, *supra*). However, by July 22, 1963, less than one-half of the contract time would remain and only about 21 percent of the work would have been completed. Appellant has not sustained its burden of proof concerning its allegations that its default was excusable or that the contract was improperly terminated for default.<sup>5</sup>

The Board concludes that by reason of the lack of progress in performance and the abandonment of the work by the contractor,<sup>6</sup> the contracting officer was justified, on July 3, 1963, in terminating the right of the contractor to proceed.<sup>7</sup>

### *The Assessment of Excess Costs*

The completion of the survey at the earliest possible time was the first order of importance for BPA. To accomplish that purpose, the remaining work was divided into three parts. It was performed by three separate groups, and the excess costs of completion were computed by the contracting officer as follows:

1. BPA force account for the first segment, 1972 hours	
@ \$5.37 per hour-----	\$10,550.20
2. Tenneson Engineering Corp., Contract No. 39798,	
middle segment-----	11,091.33
3. Harstad Associates, Inc., Contract No. 39349-----	38,062.02
<hr/>	
Total cost of completion-----	59,703.55
Credits:	
Lamb contract-----	\$38,846.51
Allowance for extra work-----	2,318.40
<hr/>	
	41,164.91
<hr/>	
Excess costs assessed against Lamb-----	18,538.64

The procedure chosen by the Government for completion of the contract does not appear to have been in the interests of the contractor with respect to mitigation of damages, even though it may have been in the best interests of the Government from the standpoint of urgency. It is not susceptible of precise calculation but it is obvious that the employment of three separate and independent firms (including the

<sup>5</sup> *Racon Electric Co., Inc.*, ASBCA No. 8020 (October 3, 1962), 1962 BCA par. 3528.

<sup>6</sup> *Shimato Construction Co.*, ASBCA No. 5513 (March 28, 1961), 61-1 BCA par. 2995, reconsideration den., 1962 BCA par. 3286.

<sup>7</sup> *Richey Construction Company*, IBCA-187 (April 8, 1960), 67 I.D. 118, 60-1 BCA par. 2554, reversed on other grounds (June 18, 1963), 70 I.D. 222, 1963 BCA par. 3783 and IBCA-456-9-64 (February 18, 1966), 73 I.D. 63, 66-1 BCA par. 5386. Cf. *Studer Construction Co.*, IBCA-117 (April 21, 1960), 60-1 BCA par. 2579 (Time extension denied).



Government force account group) is more costly than it would be if one concern performed the entire job. Moreover, the use of Government inventories for repurchase under a supply contract has been held to invalidate an assessment of excess costs.<sup>8</sup> The Government has the burden of proof in substantiating a claim for excess costs,<sup>9</sup> and must show that in the repurchase it has acted reasonably to minimize the costs of completion and thus mitigate the damages.<sup>10</sup> In the instant case the contracting officer's findings relative to excess costs are illuminating for the purpose of ascertaining where the emphasis was placed in the decision process:

In order to minimize the effect of the contractor's default on the remaining steps involved in constructing the line, the Government divided the line into three sections so that they could be worked on simultaneously.

The bid of Harstad Associates, Inc., on the original procurement was \$95,577.88, next to the highest bid received for the entire project.

We are of the opinion that the Government has shown that it preferred to complete the contract as rapidly as possible at the expense of increasing the cost of completion.

It appears from the abstracts of bids for the original procurement that the next two low bidders for the entire project were E. H. Schmidt & Associates, of Tulsa, Oklahoma, which bid the sum of \$38,675, and John D. Swift & Associates, Olympia, Washington, which bid \$43,179. It also appears from the abstracts of bids for the completion contracts that neither firm was solicited for any part of the completion work. In similar circumstances it has been held that the assessment of excess costs should be reduced to reflect the cost of completion as being based on the amount of the next low bid.<sup>11</sup>

Accordingly, the determination of the contracting officer as to excess costs is hereby recomputed as follows:

Bid of E. H. Schmidt & Associates-----	\$38, 675. 00
Increase for actual quantities-----	2, 671. 51
<hr/>	
Total cost of completion-----	\$41, 346. 51

<sup>8</sup> *Naples Food Products Co.*, ASBCA No. 8191 (October 18, 1963), 1963 BCA par. 3932 (repurchase of supplies from Government inventories held invalid). But see *T. Barry Kingman Marine Construction*, ASBCA No. 5598 (February 17, 1961), 61-1 BCA par. 2954 (Completion of vessel in Government shipyard held valid).

<sup>9</sup> *Allied Tool & Machine Co., Inc.*, ASBCA No. 9435 (February 28, 1964), 1964 BCA par. 4090; *Racon Electric Co., Inc.*, note 5 *supra*.

<sup>10</sup> *Cf. United Microwave Co., Inc.*, ASBCA Nos. 9420, 9629 (November 29, 1965), 65-2 BCA par. 5244; *Max M. Goldhaber, Trustee of Silver Refrigeration Mfg. Corp.*, ASBCA Nos. 8277, 8370 (September 8, 1965), 65-2 BCA par. 5083; *General Electronic Labs., Inc.*, ASBCA Nos. 8918, 8926 (July 22, 1964), 1964 BCA par. 4326.

<sup>11</sup> *United Microwave Co., Inc.*, note 10, *supra* (second low bidder not solicited for completion contract); *Manhattan Lighting Equipment Co., Inc.*, ASBCA Nos. 4026, 4208 (March 17, 1958), 58-1 BCA par. 1665 (second low bidder not solicited for completion contract). See also, *Consolidated Airborne Systems, Inc. v. United States*, Ct. Cl. No. 389-61 (July 16, 1965) (reduction of completion quantity held to result in increased cost of completion).

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## Credits:

Lamb contract-----	\$38,846.51	
Allowance for extra work <sup>12</sup> -----	2,318.40	
		41,164.91

Excess costs assessed against Lamb----- 181.60

*Claim for Extra Work—\$5,734.42*

In his findings as to the excess costs as set forth, *supra*, the contracting officer allowed as a credit, for the extra work of correcting the Government's error in the coordinates, the sum of \$2,318.40. The contractor's claim includes certain expenses for work that has not been substantiated as being required for the correction of the error. We consider the amount found by the contracting officer to be more reliable, since it appears that the Government representatives on the project kept close account of the number of hours expended by the contractor's forces during the period in question.

Accordingly, the Board determines that the contractor is entitled to a credit in the amount of \$2,318.40 for such work, to be applied against the excess cost of completion as set forth *supra*. The appeal is denied as to the remainder of the claim of \$5,734.42.

*Conclusion*

1. The appeal is denied as to the contractor's claim that the contract was improperly terminated for default.

2. The appeal is sustained in part as to the contractor's claim that the excess costs of completion were improperly assessed, and such excess costs are hereby reduced to the sum of \$181.60.

3. The appeal is denied as to all other claims.

THOMAS M. DURSTON,  
*Deputy Chairman.*

I CONCUR:

WILLIAM F. MCGRAW, *Member.*

CHAIRMAN RATZMAN DISQUALIFIED HIMSELF FROM CONSIDERATION OF THIS APPEAL (43 CFR 4.3).

<sup>12</sup> While the appellant turned over to the Government all partially completed work and notes, there were numerous errors and omissions that diminished their value considerably. Hence, it was determined that the Government forces, being familiar with the work, were the only persons who could make any efficient use of the material. Therefore, no allowance can be made for the theoretical use of such material by a new contractor who would be compelled virtually to redo the entire project.

**UNITED STATES OF AMERICA v. OLLIE MAE SHEARMAN ET AL.—  
IDAHO DESERT LAND ENTRIES—INDIAN HILL GROUP**

A-30759

*Decided December 30, 1966*

**Desert Land Entry: Assignment—Act of March 28, 1908**

An agreement between a desert land entryman and a corporation which gives that corporation the exclusive right to possess the entry and to grow and harvest crops thereon for a term of twenty years, is an assignment to or for the benefit of a corporation within the meaning of the prohibition in section 2 of the act of March 28, 1908.

**Desert Land Entry: Assignment—Act of March 28, 1908—Words and Phrases**

The term "assignment" as used in the act of March 28, 1908, applies to a transfer to a corporation of the rights of a desert land entryman to enter upon the lands and remain in effective control thereof and to grow and harvest crops thereon for the benefit of the corporation.

**Desert Land Entry: Assignment—Act of March 3, 1891**

To determine whether an unlawful assignment of the desert entry was made one must look to the results of the documents used to determine the real nature of the agreement rather than to the labels the parties select for their designation.

**Desert Land Entry: Assignment—Desert Land Entry: Generally**

Section 7 of the act of March 3, 1891, and section 2 of the act of March 28, 1908, read together, and in the light of other provisions of the Desert Land Law indicated, a Congressional intention to prevent a consolidation of entries and to exclude corporations from control and reclamation of the entries. Consequently, the words "assignment" and "holding" are to be given a construction that will make the apparent purpose of the Act effective.

**Desert Land Entry: Generally—Desert Land Entry: Assignment—Act of March 3, 1891**

Section 7 of the act of March 3, 1891, provides that no person or association of persons shall hold by assignment or otherwise, prior to the issue of patent, more than 320 acres of arid or desert lands.

**Desert Land Entry: Generally—Desert Land Entry: Assignment—Act of March 3, 1891—Words and Phrases**

The terms "assignment," "hold" and "otherwise" as used in section 7 of the act of March 3, 1891, are words of broad signification and their precise meanings depend on the context in which they are used.

**Desert Land Entry: Generally—Act of March 3, 1891—Words and Phrases**

A corporation which has acquired actual possession or the right of actual possession to more than 320 acres of desert land "holds" such acreage within the meaning of the prohibition of section 7 of the act of March 3 1891.

**Desert Land Entry: Cultivation and Reclamation—Act of March 3, 1891**

In order to comply with the requirements of section 2 of the act of March 3, 1891, a desert land entryman must either expend his own money on the necessary irrigation, reclamation, and cultivation of the entry or incur a personal liability for any money so expended.

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**Desert Land Entry: Applicant—Desert Land Entry: Applications—Desert Land Entry: Cultivation and Reclamation—Act of March 3, 1877**

Section 1 of the act of March 3, 1877, requires a desert land applicant to file a declaration under oath that he intends to reclaim the tract of desert land for which he is making application for entry and this intent to reclaim is of the very essence of the condition upon which the entry is permitted.

**Desert Land Entry: Cancellation**

A patent issued to an entryman who made an entry not in good faith but with intent to evade the provisions of the law was erroneously issued and obtained by fraudulent and improper means, and must be canceled.

**Rules of Practice: Supervisory Authority of Secretary—Desert Land Entry: Generally—Desert Land Entry: Final Proof—Patents of Public Lands: Effect**

Until patent issues, the Secretary of the Interior retains jurisdiction to inquire, *sua sponte*, into the validity of an entry, completed except for issuance of the patent, and to set it aside for defects or mistakes existing on the date the entryman met the final requirements.

**DECISION**

This case involves desert land entries of the Indian Hill group on lands located in Owyhee County, Idaho, near the Snake River.

On April 9, 1965, the Decision of the Director of the Bureau of Land Management dated August 14, 1964, entitled *Raymond T. Michener, et al.*, Idaho 012234, *et al.*, was set aside.<sup>1</sup> Contests were directed to be instituted against Ollie Mae Shearman, I-013911, and the Estate of Charles R. Shearman, I-013912. It was ordered that entryman Raymond T. Michener, Marjorie K. Michener, Norma E. Barnes, Charles E. Barnes, and Blaine L. Garn be given an opportunity to show cause why their final proofs should not be rejected and their entries canceled. The Bureau was directed to conduct hearings in these cases and also to take evidence on the advisability of instituting actions against Wallace Reed, Joseph L. Nielson, Robert R. Schwarze, Myrtle M. Reed and George L. Crapo for cancellation of patents theretofore issued to them. The hearing examiner was instructed to submit a recommended decision after giving all parties an opportunity to be heard.

On June 17, 1965, leave was granted to Hoodco Farms, Inc., to intervene.

Accordingly, hearings were held in Boise and Idaho Falls, Idaho, in September and October 1965. All of the entrymen and the intervenor were represented by counsel and had a full opportunity to be heard, over two thousand pages of testimony and argument were recorded, hundreds of documentary exhibits were considered and the case was

<sup>1</sup> Order published 72 I.D. 182.

thoroughly briefed by counsel. Chief Hearing Examiner Dent D. Dalby rendered his Recommended Decision on May 25, 1966. Mr. Dalby's Recommended Decision will be published in the Decisions of the United States Department of the Interior as an appendix to this Decision.

The Hearing Examiner concludes,

Title 43 U.S.C. sec. 329 provides that "claims or entries \* \* \* shall be subject to contest \* \* \* for \* \* \* failure to comply with the requirements of law and upon satisfactory proof thereof shall be canceled, and the lands, and moneys paid therefor, shall be forfeited to the United States." Since, in this case, there has been a failure to comply with the requirements of law, the entries must be canceled.

Exceptions to the Examiner's findings and proposed findings have been filed by the contestees, intervenor and patentees.

Upon consideration of the entire record in this case, including the "Recommended Decision" of the Chief Hearing Examiner, Dent D. Dalby, the exceptions thereto, the proposed findings and conclusions of contestees, patentees and intervenor, and the motion to dismiss of certain contestees and intervenor, I hereby make the following findings of fact:

1. That the findings of fact of Chief Hearing Examiner, Dent D. Dalby, are supported by substantial evidence and are approved and accepted;

2. That at the time their entries were allowed and for a long time prior thereto, none of the contestees and patentees herein, intended to reclaim the lands of their respective entries for their own benefit, or at all;

3. That after their entries were allowed, none of the contestees and patentees herein maintained their entries in good faith for their own benefit, or at all;

4. That prior to the dates their entries were allowed, all of the contestees and patentees herein assigned their entries to Hoodco Farms, Inc., and Idaho corporation; that all of said assignments are in full force and effect and have never been revoked or rescinded;

5. That prior to the issue of patents to the patentees, the intervenor, Hoodco Farms, Inc., held by assignment and lease all of the lands of the entries of all of the contestees and patentees herein, a total area of more than three hundred and twenty acres, to wit, a total area of three thousand six hundred and eighty-eight and six-tenths acres;

6. That each of the contestees and patentees herein failed to expend three dollars per acre, or any other sum, for the irrigation, reclamation, and cultivation of his entry;

7. That each of the entrymen, including each of the contestees and patentees, obtained his entry and each of the patentees obtained his patent, by fraud, deceit, concealment of truth and misrepresentation,

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for the purpose of acquiring said entries and patents and of the lands embraced therein, from the United States of America;

8. That said fraud, deceit, concealment of truth and misrepresentation was, at all times material herein, well known to and consciously undertaken by some of the entrymen, and by the intervenor and was well known to and consciously undertaken by agents authorized to act for and on behalf of, and acting for and on behalf of, all entrymen;

9. That early in 1965, and after the issuance of patents to the patentees herein, each of the patentees executed an option agreement and deed of his entry to Virginia Agricultural Products Company, a California corporation, and deposited the same in escrow;

10. That said Virginia Agricultural Products Company, at all times material herein, well knew of the facts hereinbefore found and well knew that said patents had been acquired from the United States of America, by fraud, deceit, concealment of truth and misrepresentation as aforesaid.

From these findings I make the following conclusions of law:

#### I

That the entrymen did not intend in good faith to reclaim the lands of their respective entries for their own benefit as required by law;

#### II

That the entrymen did not maintain their entries in good faith for their own benefit as required by law;

#### III

That the entrymen assigned their entries to a corporation in violation of law;

#### IV

That intervenor held and now holds unpatented desert lands in excess of three hundred and twenty acres, in violation of law;

#### V

That none of the entrymen expended three dollars per acre for irrigation, reclamation, and cultivation of his entry, as required by law;

#### VI

That each entrymen obtained his entry and each patentee obtained his patent by material fraud on the United States of America;

## VII

That intervenor participated in and benefited from said fraud;

## VIII

That said Virginia Agricultural Products Company was not at any time material herein and is not now a bona fide purchaser of any interest in the lands of said entries;

## IX

That all of said entries must be canceled and all moneys paid therefor must be forfeited to the United States;

## X

That the motion to dismiss must be denied.

Now, therefore, it is ordered,

1. That the Recommended Decision of Chief Hearing Examiner Dent D. Dalby is adopted and approved;

2. That the motion to dismiss is denied; the exceptions are overruled; the proposed findings and conclusions are rejected;

3. That the final proofs of Raymond T. Michener, I-012234, Marjorie K. Michener, I-012241, Norma E. Barnes, I-012342, Charles E. Barnes, I-012343, Elaine L. Garn, I-012349, Ollie Mae Shearman, I-013911, and Estate of Charles R. Shearman, I-013912, be rejected and that their entries be, and they hereby are, canceled;

4. That the Director of the Bureau of Land Management cause the said entries to be canceled on the books and records of the Bureau;

5. That the Solicitor transmit the records and files in this case to the Attorney General with a request that appropriate actions be instituted (a) to cancel the patents heretofore issued to Wallace Reed (Patent No. 1236706 issued September 3, 1964), Joseph L. Nielsen (Patent No. 1236707 issued September 3, 1964), Robert R. Schwarze (Patent No. 1236708 issued September 3, 1964), Myrtle M. Reed (Patent No. 1236709 issued September 3, 1964) and George L. Crapo (Patent No. 1236710 issued September 3, 1964); and (b) to take such other action as may be necessary to protect the interests of the United States;

6. That the Solicitor and the Director of the Bureau of Land Management take steps to recover possession of the lands embraced within the entries contested in this proceeding.

STEWART L. UDALL,  
*Secretary of the Interior.*

December 30, 1966

May 25, 1966

**RECOMMENDED DECISION***Statement of the Case*

This proceeding was initiated (1) by the filing of complaints by the Idaho Land Office Manager of the Bureau of Land Management dated April 22, 1965, against Ollie Mae Shearman and the Estate of Charles R. Shearman; (2) by the issuance of an order dated June 17, 1965, by the Associate Director amending complaints dated July 2, 1964, against Raymond T. Michener, Marjorie K. Michener, Norma E. Barnes, Charles E. Barnes, and Blaine L. Garn; and (3) by a Notice of Hearing issued by the Associate Director dated June 17, 1965, addressed to Wallace Reed, Joseph L. Nielsen, Robert R. Schwarze, Myrtle M. Reed, and George L. Crapo. Hoodco Farms, Inc., was recognized as an intervenor.

The Government was represented by Mr. William Burpee, Boise, Idaho; Mr. Gary Weatherford, Washington, D.C.; and Mr. George Miron, Washington, D.C., all of the Office of the Solicitor, United States Department of the Interior. Contestees Raymond T. Michener and Marjorie K. Michener and patentees Wallace Reed, Joseph L. Nielsen, Robert R. Schwarze and Myrtle M. Reed were represented by Mr. Dennis M. Olsen and Mr. George C. Petersen, Petersen, Moss and Olsen, Idaho Falls, Idaho. Contestees Norma E. Barnes, Charles E. Barnes, Blaine L. Garn, and patentee George L. Crapo were represented by Mr. C. Timothy Hopkins, Holden, Holden and Kidwell, Idaho Falls, Idaho. Contestees Ollie Mae Shearman and the Estate of Charles R. Shearman were represented by Mr. A. C. Kiser, Boise, Idaho. Intervenor Hoodco Farms, Inc., was represented by Mr. William P. Gray, Gray, Pfaelzer and Robertson, Los Angeles, California. For convenience, the contestees and patentees will hereinafter be referred to as contestees unless otherwise indicated.

A hearing on the complaints, the Order to Show Cause, and the Notice was held at Boise, Idaho, on September 7, 8, 9 and 10, October 4, 5, 6, 7 and 8, and at Idaho Falls, Idaho, on October 11, 12, 13, 14, 15, 19 and 20, 1965. Post-hearing briefs were filed by the Government on December 5, 1965, and February 10, 1966; by contestees Raymond T. Michener, Marjorie K. Michener, Wallace Reed, Joseph L. Nielsen, Robert R. Schwarze, Myrtle M. Reed, Ollie Mae Shearman, the Estate of Charles R. Shearman and Hoodco Farms, Inc., on January 14, 1966; and by contestees Charles E. Barnes, Norma E. Barnes, Blaine L. Garn, and George L. Crapo on January 20, 1966.

The findings of fact and conclusions of law which follow are based upon the record in the case.



*Findings and Conclusions**I. Precedent Proceedings*

The Acting Manager of the Idaho Land Office of the Bureau of Land Management issued complaints against Ollie Mae Shearman, Charles R. Shearman, Raymond T. Michener, Marjorie K. Michener, Norma E. Barnes, Charles E. Barnes, Blaine L. Garn, Wallace Reed, Joseph L. Nielsen, Robert R. Schwarze, Myrtle M. Reed and George L. Crapo in July 1964, pursuant to 43 CFR 1852, charging each with having granted to others long-term contractual agreements involving his desert land entry to avoid the assignment provisions of the Desert Land Act; entering into legal obligations that permit the sale of his entry after patent; entering into arrangements to allow an association of persons to hold more than 320 acres of desert land prior to the issuance of patent; and failing to make a bona fide entry with intent to reclaim desert land. The complaints were served upon all of the contestees except Ollie Mae Shearman and Charles R. Shearman.

On July 11, 1964, the Government, represented by the Acting State Director of the Bureau of Land Management and the Field Solicitor, and the contestees who had been served entered into a stipulation. This stipulation provided for "an immediate hearing of the case by the Secretary without further notice and upon the record as set forth" therein. The stipulation further provided that all parties thereto were agreed "that the matters in dispute as set forth in complaint and answer filed therein with respect to the desert land entries in question may be determined upon the record and the evidence set forth" therein.

On August 14, 1964, the Director of the Bureau of Land Management issued a decision upon the merits resolving all of the issues raised by the complaints and answers favorable to the ten contestees involved, dismissed the complaints, and remanded the cases to the Boise Land Office "for appropriate administrative action." The Land Office Manager thereupon issued patents to Wallace Reed, Joseph L. Nielsen, Robert R. Schwarze, Myrtle M. Reed, and George L. Crapo on September 3, 1964.

At the request of the Secretary of the Interior, the stipulated record was reviewed by the Solicitor. The Solicitor issued an opinion dated April 5, 1965, holding that "in this case it was unsound policy to evaluate the proofs and dismiss the Contest on the basis of the stipulated record," and that "if, however, the facts disclosed in the record are true, the Director's Decision was incorrect on the law." He transmitted this opinion to the Secretary of the Interior with a memorandum dated April 6, 1965, recommending that the Director's decision be set aside, that proceedings be instituted against those contestees who had not been issued patents, and that the cases in which

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patents had been issued be transmitted to the Department of Justice for initiation of actions to cancel the patents. The Secretary of the Interior issued a memorandum dated April 9, 1965, directing that the decision of the Director of the Bureau of Land Management be set aside and that further proceedings be instituted against the unpatented entries.

The Land Office Manager issued complaints dated April 22, 1965, against Ollie Mae Shearman and the Estate of Charles R. Shearman. The Associate Director, on June 17, 1965, issued an order amending the July 2, 1964, complaints against Raymond T. Michener, Marjorie K. Michener, Norma E. Barnes, Charles E. Barnes, and Blaine L. Garn. These actions are directed to a cancellation of the contestees' desert land entries. Also on June 17, 1965, a Notice of Hearing was issued to the patentees directing them to appear at a hearing to present evidence concerning the matters covered by the charges for a determination as to whether their patents were erroneously issued or obtained by fraudulent or improper means. This determination is to be the basis for a decision as to whether court action will be initiated to annul the patents. All of these actions were consolidated.

## *II. The Issues*

The complaints, as amended, charged the contestees with entering into agreements, notes and mortgages with Hoodco Farms, Inc., with respect to their desert land entries that constitute prohibited assignments to or for the benefit of a corporation, failing to expend the amount of money required by law necessary for the irrigation, reclamation and cultivation of the land, and making and maintaining entry with no intention to reclaim the land in good faith. The complaints also charged that Hoodco Farms, Inc., held entries in excess of 320 acres. The complaints requested that the desert land entries be canceled.

Title 43 sec. 321 of the United States Code pertaining to desert land entries provides:

It shall be lawful for any citizen \* \* \* upon payment of 25 cents per acre—to file a declaration \* \* \* with \* \* \* the Secretary of the Interior \* \* \* that he intends to reclaim a tract of desert land not exceeding one-half section, by conducting water upon the same, within the period of three years thereafter: \* \* \* Said declaration shall describe particularly said one-half section of the land \* \* \*. At any time within the period of three years after filing said declaration, upon making satisfactory proof to \* \* \* the Secretary of the Interior of the reclamation of said tract of land in the manner aforesaid, and upon the payment \* \* \* of the additional sum of \$1 per acre for a tract of land not exceeding three hundred and twenty acres to any one person, a patent \* \* \* shall be issued to him \* \* \* no person may make more than one entry \* \* \*. The aggregate acreage of desert land which may be entered by any one person \* \* \* shall not

exceed three hundred and twenty acres \* \* \*. (Mar. 3, 1877, c. 107, § 1, 19 Stat. 377; Mar. 3, 1891, c. 561 § 2, 26 Stat. 1096.)

\* \* \* \* \*

#### Section 324:

No assignment \* \* \* shall be allowed or recognized, except it be to an individual who is shown to be qualified to make entry \* \* \* and such assignments may include all or part of an entry; but no assignment to or for the benefit of any corporation or association shall be authorized or recognized. (Mar. 28, 1908, c. 112, § 2, 35 Stat. 52.)

\* \* \* \* \*

#### Section 327:

At the time of filing the declaration \* \* \* the party shall also file a map of said land, which shall exhibit a plan showing the mode of contemplated irrigation, and which plan shall be sufficient to thoroughly irrigate and reclaim said land, and prepare it to raise ordinary agricultural crops, and shall also show the source of the water to be used for irrigation and reclamation. Persons entering or proposing to enter separate sections, or fractional parts of sections, of desert lands, may associate together in the construction of canals and ditches for irrigating and reclaiming all of said tracts, and may file a joint map or maps showing their plan of internal improvements. (Mar. 3, 1891, c. 561, § 2, 26 Stat. 1096.)

#### Section 328:

No land shall be patented to any person \* \* \* unless he or his assignors shall have expended in the necessary irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same, at least \$3 per acre of whole tract reclaimed and patented in the manner following: Within one year after making entry \* \* \* the party so entering shall expend not less than \$1 per acre for the purposes aforesaid; and he shall in like manner expend the sum of \$1 per acre during the second and also during the third year thereafter, until the full sum of \$3 per acre is so expended. Said party shall file during each year with \* \* \* the Secretary of the Interior proof, by the affidavits of two or more credible witnesses that the full sum of \$1 per acre has been expended in such necessary improvements during such year, and the manner in which expended, and at the expiration of the third year a map or plan showing the character and extent of such improvements. If any party \* \* \* shall fail during any year to file the testimony aforesaid the lands shall revert to the United States and the 25 cents advanced payment shall be forfeited to the United States, and the entry shall be canceled. Nothing herein contained shall prevent a claimant from making his final entry and receiving his patent at an earlier date than hereinbefore prescribed, provided that he then makes the required proof of reclamation to the aggregate extent of \$3 per acre: *Provided*, That proof be further required of the cultivation of one-eighth of the land. (Mar. 3, 1891, c. 561, § 2, 26 Stat. 1096.)

#### Section 329:

At any time after filing the declaration \* \* \* upon making satisfactory proof to the \* \* \* Secretary of the Interior of the reclamation and cultivation of said land to the extent and cost and in the manner aforesaid, and substantially in accordance with the plans herein provided for \* \* \* and upon payment \* \* \* of the additional sum of \$1 per acre for said land, a patent shall issue therefor to the applicant or his assigns; but no person or association of persons shall hold

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by assignment or otherwise prior to the issue of patent, more than three hundred and twenty acres of such arid or desert lands \* \* \* *Provided, however,* That additional proofs may be required at any time within the period prescribed by law, and that the claims or entries \* \* \* shall be subject to contest \* \* \* for illegal inception, abandonment, or failure to comply with the requirements of law, and upon satisfactory proof thereof shall be canceled, and the lands, and the moneys paid therefor, shall be forfeited to the United States. (Mar. 3, 1891, c. 561, § 2, 26 Stat. 1096.)

The issues raised by the complaints and contestees' answers as set forth in the prehearing order and modified at the outset of the hearing (Tr. 6-8) are:

1. Whether each entry was made and is maintained with no intent on the part of the entryman to reclaim the lands and is not maintained in good faith as required by section 1 of the act of March 3, 1877 (19 Stat. 377, 43 U.S.C. sec. 321).

2. Whether patents issued to Wallace Reed, Joseph L. Nielsen, Robert R. Schwarze, Myrtle M. Reed, and George L. Crapo were erroneously issued or obtained by fraudulent or improper means.

3. Whether the agreements, notes and mortgages between the entryman and Hoodco Farms, Inc., constitute prohibited assignments to or for the benefit of a corporation in violation of section 2 of the act of March 28, 1908 (35 Stat. 52, 43 U.S.C. sec. 324).

4. Whether Hoodco Farms, Inc., hold in excess of 320 acres in violation of section 7 of the act of March 3, 1891 (26 Stat. 1096, 43 U.S.C. sec. 329).

5. Whether each entryman has failed to expend that amount required by law necessary for the irrigation, reclamation, and cultivation of the lands as required by section 5 of the act of March 3, 1891 (26 Stat. 1096, 43 U.S.C. sec. 328).

6. Whether the entrymen are, as a matter of law, entitled to receive patents to their entries.

7. Whether the Government is bound by the stipulation and record in the proceedings upon which the order of August 14, 1964, was based and is restricted to that record.

8. Whether the charges, if proved, are grounds for cancellation of the entries.

### *III. The Original Financing Plan*

In 1960, Raymond T. Michener, an agricultural engineer, and Wallace Reed, manager of a farm equipment store, became interested in developing desert land entries in an area in Owyhee County, Idaho, known as Indian Hill. The area consists of a flat plateau approximately 400 feet above the Snake River. In November of 1960, they visited Indian Hill and started a preliminary appraisal of the productive capacity of the soil (Tr. 1220). The amount of investment necessary to raise the water from the Snake River to the desert lands on Indian Hill necessitated the development of several desert land entries to make the project economically feasible. Reed and Michener, therefore, began interesting other people in the vicinity of Idaho Falls, where they lived, in filing desert land entries on Indian Hill. They prepared a brochure (G-372)<sup>1</sup> briefly describing the proposed project. The document stated that the "proposal consists of a plan to irrigate some 4,800 acres in the Northeast corner of Owyhee County, Idaho." The brochure included two maps of the Indian Hill area, one of which outlined a proposed irrigation system. The land with sprinkler system installed was estimated to cost \$236 per acre with power charges estimated to run from \$11.52 to \$15.36 per acre per season. Under "Financing" the brochure stated that "arrangements can be made to purchase the land and equipment for 25 percent down." A large map of the proposed project was displayed in Reed's hardware store and the brochure was shown to interested persons.

Early in 1961, Reed and Michener succeeded in interesting Marjorie K. Michener (Raymond T. Michener's wife), Charles E. Barnes, Norma E. Barnes (Charles E. Barnes' sister), Blaine L. Garn, Myrtle M. Reed (Wallace Reed's mother), Joseph L. Nielsen, Robert R. Schwarze, George L. Crapo, Charles H. Sargent and Warren J. Bendixsen in filing desert land entry applications. Reed and Michener assisted the applicants in the preparation of their applications, supplying all of the technical information required. The following desert land applications were then filed with the land office:

<sup>1</sup> Both the Government's and the contestees' exhibits are numbered numerically. The Government's exhibits are identified with the letter "G," and the Contestees' with the letter "C."

Entry No.	Date of filing	Name	Description	Acreage
I-012234-----	1-20-61	Raymond T. Michener-----	SE $\frac{1}{4}$ , S $\frac{1}{2}$ NE $\frac{1}{4}$ , Sec. 5, N $\frac{1}{2}$ NE $\frac{1}{4}$ Sec. 8, T. 6 S., R. 8 E., B.M-----	320
I-012235-----	1-20-61	Wallace Reed-----	N $\frac{1}{2}$ Sec. 9, T. 6 S., R. 8 E., B.M-----	320
I-012241-----	1-23-61	Marjorie K. Michener-----	SW $\frac{1}{4}$ , SW $\frac{1}{4}$ SE $\frac{1}{4}$ , Sec. 4, T. 6 S., R. 8 E., B.M-----	200
I-012242-----	1-23-61	Joseph L. Nielsen-----	S $\frac{1}{2}$ Sec. 9, T. 6 S., R. 8 E., B.M-----	320
I-012243-----	1-23-61	Robert R. Schwarze-----	S $\frac{1}{2}$ S $\frac{1}{2}$ Sec. 10, N $\frac{1}{2}$ NW $\frac{1}{4}$ , W $\frac{1}{2}$ NE $\frac{1}{4}$ Sec. 15, T. 6 S., R. 8 E., B.M-----	320
I-012244-----	1-23-61	Myrtle M. Reed-----	SW $\frac{1}{4}$ NE $\frac{1}{4}$ , S $\frac{1}{2}$ NW $\frac{1}{4}$ , N $\frac{1}{2}$ S $\frac{1}{2}$ Sec. 10, T. 6 S., R. 8 E., B.M-----	280
I-012299-----	2- 2-61	George L. Crapo-----	SW $\frac{1}{4}$ , S $\frac{1}{2}$ NW $\frac{1}{4}$ & N $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 15, T. 6 S., R. 8 E., B.M-----	320
I-012342-----	2- 6-61	Norma E. Barnes-----	SE $\frac{1}{4}$ , E $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 7, W $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 8, T. 6 S., R. 8 E., B.M-----	320
I-012343-----	2- 6-61	Charles E. Barnes-----	SE $\frac{1}{4}$ , E $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 8, N $\frac{1}{2}$ NW $\frac{1}{4}$ Sec. 17, T. 6 S., R. 8 E., B.M-----	320
I-012349-----	2- 8-61	Blaine L. Garn-----	NE $\frac{1}{4}$ , N $\frac{1}{2}$ SE $\frac{1}{4}$ , SE $\frac{1}{4}$ NW $\frac{1}{4}$ & NE $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 17, T. 6 S., R. 8 E., B.M-----	320
I-013911-----	1-26-61	Warren J. Bendixsen-----	W $\frac{1}{2}$ Sec. 5, T. 6 S., R. 8 E., B.M-----	328. 6
I-013912-----	2- 3-61	Charles H. Sargent-----	S $\frac{1}{2}$ NE $\frac{1}{4}$ Sec. 7, NW $\frac{1}{4}$ , S $\frac{1}{2}$ NE $\frac{1}{4}$ Sec. 8, T. 6 S., R. 8 E., B.M-----	320
Total-----				3688. 6

Each of the applicants paid the required declaration fee of 25 cents per acre, plus the \$15 filing fee, for a total of \$95. The applicants filed irrigation maps indicating their proposals for reclaiming the desert land. Each of these maps showed a buried penstock running lengthwise through the center of their entries with 4-inch laterals equipped with sprinklerheads running at right angles to the penstock in sufficient number to water the cultivatable portions of their entries. This irrigation proposal corresponded with the plan presented in the Reed and Michener brochure.

At about this time, Raymond T. Michener and Marjorie K. Michener applied for purchase from the State of Idaho of the east half of section 16, Township 6 South, Range 8 East, located in the south-central portion of the Indian Hill project, and Wallace Reed and Leona Reed applied for purchase of the west half. The State issued land sale certificates to the applicants on July 14, 1961 (G-228-5 and G-228-6). The total price for each half section was \$7,200—\$720 down and the balance in annual installments over a 40-year period.

In March 1961, Reed and Michener filed Articles of Incorporation for the Indian Hill Irrigation Company (G-98). A Certificate of Incorporation was issued by the State of Idaho on March 7, 1961 (G-97). The Articles of Incorporation specified that Indian Hill was a nonprofit corporation organized "to acquire, hold, own, maintain and control waters" to be distributed "at cost to its stockholders owning land in the area susceptible of irrigation." The corporation would "deliver water to no one who has not purchased one share of stock of the corporation for each acre \* \* \* of irrigable land owned by him within the area served by the corporation's distribution system." Other purposes specified were "to construct, own, operate and control" an irrigation system and "to acquire, own, operate and manage irrigable land" and "to sell such land to bona fide settlers and operators of lands in such area." The Articles provided for a board of directors, but did not provide for corporate officers.

The Articles of Incorporation also provided for a capital stock of 10,000 shares with a par value of \$1 per share. The Articles listed Wallace Reed, Raymond T. Michener, Marjorie K. Michener, Myrtle M. Reed and Robert R. Schwarze as incorporators. Each incorporator was listed as a subscriber of 160 shares. The organization of the corporation was not completed until two years later. Until then, by-laws were not adopted, stock subscriptions were not obtained nor stock certificates issued.

The company did not hold regular or formal meetings of its stockholders or board of directors, or maintained a set of minutes, although, informal meetings of some of the entrymen were held at irregular intervals and memorandum notations were made of matters decided or discussed. There was apparently no election of directors or officers of the corporation. Nevertheless, Reed and Michener assumed control of Indian Hill—Reed as president and Michener as secretary. Pay-

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ments in the amount of \$240 each were made to the company by Bendixsen, Schwarze, Crapo and Nielsen, and \$160 each by Blaine L. Garn and Norma Barnes, and \$80 by Charles Barnes, which were designated as assessments. In August of 1962, they were recorded on the books of Indian Hill as "Stockholders Advances" and tabulated under the heading "Summary of Equity" (G-69). There is no indication that the assessments were regarded either by the entrymen or by the Indian Hill Company as payments for stock.

In March of 1961, Reed and Michener began efforts to obtain financing for irrigating the entries from the United States Bureau of Reclamation under the Small Reclamation Projects Act of August 6, 1956 70 Stat. 1044, 43 U.S.C. sec. 422a *et seq.*) On March 10, Reed submitted to the Bureau of Reclamation a notice of intent to apply for a loan (C-13). He stated that the notice "was authorized by resolution of the board of directors of the Indian Hill Irrigation Company on March 3, 1961," although Indian Hill was not incorporated until March 7 (G-97). During 1961 and 1962, Reed and Michener filed at least three detailed reports to the Bureau of Reclamation in an effort to obtain the loan (C-14, C-15 and C-16). The last of these (C-16) estimated the total cost of the reclamation project at \$1,921,478. The contribution of Indian Hill was to be \$95,828. The difference between these amounts represented the hoped-for loan. The financial statement of the Indian Hill Company listed as an asset "Mortgages on 4,320 acres Subscribed, \$97,200." The evidence does not disclose that any mortgages were in existence or subscribed as of November 1, 1961, the date of the financial statement.

#### *IV. The Proposal for Farming the Entries*

By the fall of 1962, Reed and Michener became convinced that a loan to finance the project could not be obtained from the Bureau of Reclamation. They, therefore, began looking for other sources of financing and in late 1962 contacted the Travelers Insurance Company. In a letter dated January 16, 1963 (C-24), Travelers indicated that it would be willing to make a 20-year loan of \$125,000 at 6½ percent interest, but required 1,000 acres under irrigation as security. Travelers required a first mortgage on the section 16 land and the completion of the requirements for title on two desert entry filings. The company additionally required "that the property be under lease to a competent and well-financed tenant who is doing an acceptable job of farming." Reed would also be required to pledge his home farm as additional security.

In the fall of 1962, Reed and Michener approached the Mode Realty in Nampa, Idaho, to obtain a tenant. Mode obtained A. J. Jolley as a prospective tenant in response to a newspaper advertisement. According to Jolley, he met Reed and Michener and entered into an oral



agreement for a five-year lease with an option to purchase in January 1963 (Tr. 374). However, Reed and Michener concluded that Jolley did not have sufficient financial resources to operate a project of the size contemplated (Tr. 375). Jolley then obtained as a partner, Gib Masterson. Masterson, an experienced and successful livestock feeder, was president and owner of Ore-Ida Motors, Inc. A partnership agreement between Jolley and Ore-Ida Motors, Inc., was signed by Jolley and Masterson on February 6, 1963 (G-351). Ore-Ida Motors, was to provide \$10,000 operating capital, acquire one-half interest in Jolley's agricultural machinery, and receive a note from Jolley for \$6,500. Jolley was to draw \$500 per month salary for his full time efforts on the Indian Hill project. The proceeds of the partnership were to be equally divided. Prior to the signing of the Jolley-Ore-Ida partnership agreement, Reed and Michener entered into negotiations with Jolley and Masterson at Masterson's office in Ontario, Oregon, to lease the Indian Hill property. They arrived at an agreement which Masterson's secretary composed and typed (G-350, C-28). The "Purpose and Scope" of this agreement was "to define the terms of a crop share lease with options to buy" the desert land entries. Reed and Michener warranted "that a firm title can be furnished by them to section 16." As to the balance of the area, lessors warranted that the land was held under desert land entries and that title could be furnished upon the lessees furnishing a bona fide entryman as purchaser. It was agreed that the lessees could take a long-term renewable lease extended to the patent and supported by a mortgage covering the development costs on the desert land entries. The purchase price "per developed acre" varied between \$200 and \$250, depending upon the time the option was exercised.<sup>3</sup> The Lease-Option Agreement was signed and acknowledged by Masterson and Jolley on February 6, 1963, but not by Reed or Michener.

On February 11, 1963, Jolley and Ore-Ida, with the knowledge and consent of Reed and Michener, subleased for five years all of the land to O. J. Stewart, C. Douglas Stewart, and Paul Stewart (G-366). The distribution of the crops under the two leases would be:

	Reed & Michener	Jolley-Ore-Ida	Stewarts
Potatoes.....	$\frac{1}{4}$	$\frac{1}{12}$	$\frac{2}{3}$
Grain.....	$\frac{1}{2}$	-----	$\frac{1}{2}$
Hay.....	$\frac{1}{2}$	-----	$\frac{1}{2}$
Alfalfa seed.....	$\frac{1}{2}$	-----	$\frac{1}{2}$
Beets.....	$\frac{1}{4}$	$\frac{1}{12}$	$\frac{2}{3}$

<sup>3</sup> The agreement is described in greater detail *infra*, pp. 417, 418.

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The entrymen would receive no return from the crops. The leases did not specify acreage to be planted to any particular crop. Since the Stewarts were not required to plant either potatoes or beets, Jolley and Masterson were not assured of any income from the farming operations.

Reed and Michener called a special meeting of the entrymen for February 12, 1963, which was held that evening at Reed's store in Idaho Falls. The meeting was attended by all of the entrymen except Charles and Norma Barnes (G-4-38A; G-4-39). Reed and Michener advised the entrymen that they had given up hope of obtaining the small projects loan from the Bureau of Reclamation. They also advised that they were attempting to get private financing through the Travelers Insurance Company. The entrymen were informed by Reed and Michener that they had spent in the neighborhood of \$1,000 on each entry and in order to proceed with the development of the project each entryman would have to pay \$983 in cash and assume personal obligations of between \$12,000 and \$14,000. However, they were given an alternative. Reed and Michener would go ahead and try to develop the project with non-recourse notes, mortgages and leases to be signed by the entrymen, in which case the entrymen would receive \$10 an acre for the land in their entries after patent. Schwarze, Bendixsen and Sargent decided not to participate further in the project and expressed a willingness to relinquish their entries.

#### *V. The Initial Leases and Mortgages*

Each of the entrymen signed a note (G-368, G-373), a mortgage (G-369), and a "Lease and Land Development Contract" (G-374), dated February 18, 1963. The notes were non-recourse for an amount computed at \$300 per acre on the total acreage in each entry payable to Indian Hill Irrigation Company on demand, and supported by a mortgage to Indian Hill in the same amount. The note specified that it was given to secure the entryman's obligation to pay for expenses incurred in the development of land described in a lease between the parties of the same date.

The "Lease and Land Development Contract" leased the entries to Indian Hill Irrigation Company for a term of 20 years. Each entryman was to receive a total rent of \$10 per acre at the rate of \$1 per acre per year. The rent would be reduced by \$10 per acre "which is, as a result of administrative action of the Federal Government, dropped from the acreage originally applied for under lessor's desert entry application." The contract provided that the expenses for which the entrymen would be obligated to pay "shall be those necessarily incurred to bring the lands herein demised to a point of being tillable as irrigated land." Indian Hill Irrigation Company was obligated "to perform as a minimum obligation on its part, ample

construction of the irrigation works for said project to meet the requirements for annual proofs with respect to" the desert land entry and to "bear the expenses \* \* \* incurred for the purpose of raising crops thereon including the costs of plowing for planting, planting, cultivating, harvesting." Indian Hill had the option of terminating the agreement on 30 days notice without obligation to perform additional work upon payment of \$50 less any rental paid prior to the cancellation. Indian Hill had the right to sublease or assign its rights "as it sees fit." Under the notes, mortgages and contracts, only the land was obligated for payment of development costs, not the entrymen.

After the execution of the notes, the mortgages, and the Lease and Land Development Contracts, Reed and Michener signed the "Lease-Option Agreement" that had previously been executed by Masterson and Jolley on February 6, 1963 (Tr. 1630, 1781). At about this same time, Reed induced Schwarze not to relinquish his desert land entry, as he had intended, because it was strategically located and essential to the development of the Indian Hill project (Tr. 1451-1452). Schwarze also signed the development contract with the Indian Hill Irrigation Company (Tr. 1453).

In January 1963, Reed and Michener were in contact with representatives of the Intermountain Gas Company (Tr. 488-489). Intermountain was particularly interested in promoting the use of gas engines to increase its sales during the spring and summer months when demand for gas was minimal. Intermountain induced Reed and Michener to change the planned irrigation system from electric power to gas and agreed to furnish the gas engines for the project. In a letter dated January 27, 1965, Reed and Michener agreed "to pay \$0.10 per therm for natural gas \* \* \* for irrigating our farm located in Twp. 6 S., R. 8 E. B.M., Owyhee County, Idaho," on condition that Intermountain furnish and maintain gas engines (G-342). The standard irrigation contract rate is 5½ cents per therm (Tr. 499). The additional 4½ cents was to be paid to compensate Intermountain for supplying the engines (Tr. 500).

J. R. McKinney, manager of the irrigation department of Intermountain, referred Reed and Michener to Charles R. Shearman as a possible source of financing the irrigation project. He introduced Reed to Shearman on February 15, 1963 (Tr. 508). Shearman was vice president and half owner of Hood Corporation and in charge of its field activities. Hood was a substantial company performing extensive pipe construction work in the western States under both Government and private contracts, which included some with Intermountain.

Shearman talked with Reed and Michener about the Indian Hill project on February 15, 1963 (Tr. 508), and examined the area on the following day (Tr. 1288). Shearman was "quite interested and he was also interested in getting an entry himself, or several entries

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himself" (Tr. 1287-1288). After examining the February 18, 1963, notes, mortgages, and Lease and Land Development Contracts signed by the entrymen, Shearman "agreed to put the amount of money in the project that [Reed and Michener] had put in and become a part of the operation" (Tr. 1288).

The latter part of February, Indian Hill Irrigation Company and Intermountain Gas Company executed an agreement (G-341) which obligated Intermountain to furnish and install by May 1, 1963, engines of adequate horsepower to irrigate 1,200 acres. Indian Hill agreed to purchase all of its gas pumping requirements at the rate of 10 cents per therm and deposit annually in advance a minimum of \$18,500. This agreement was signed on behalf of Indian Hill Irrigation Company by Wallace Reed and C. R. Shearman. At that time, Shearman told McKinney that "he was a part of the Indian Hill operation" (Tr. 507-508).

Intermountain had approached Hood Corporation about the installation of gas engines prior to the February agreement with Indian Hill Irrigation Company and, apparently acting upon the January 27, 1963 letter of Reed and Michener, requested Hood to install the engines at Indian Hill. Hood sent a telegram to Nordberg Manufacturing Company of Milwaukee, Wisconsin, ordering the engine (G-173-1) and signed a contract with that company dated February 19, 1963, for the purchase of two gas operated engines at a cost of \$133,225 (G-173-3). Hood Corporation subsequently assumed Intermountain's obligations to furnish the gas engines to the Indian Hill project under the February agreement. On June 4, 1963, Wallace Reed, on behalf of the Indian Hill Irrigation Company, assigned to Hood the 4½ cents per therm refund from the Gas Company (G-343).

The agreement or understanding between Reed, Michener and Shearman concerning Shearman's participation in Indian Hill was never reduced to writing. Michener testified that the arrangement was to "develop, assist in the development of the land" with Shearman "more or less a silent partner" (Tr. 1726) and that "he was interested in participating entirely in the project" (Tr. 1727). Reed testified that Shearman "became a part of the operation" (Tr. 1288) and that "we went in there to prove up on the land and grow a crop" with him and Michener doing the work and Hood Corporation furnishing the money (Tr. 1289). The anticipated income from the crop was to be shared between Reed, Michener and Shearman on an equal basis (Tr. 1288).

As a part of the arrangement, Reed made a deal with Shearman to pay Sargent and Bendixsen \$5 an acre to relinquish their entries. In furtherance of this agreement, Reed prepared relinquishments (G-347, G-348) and obtained Sargent's and Bendixsen's signatures

(G-383, p. 97-98). Charles R. Shearman filed a desert land application on the Sargent entry and Ollie Mae Sherman (Charles' wife) on the Bendixsen entry on February 21, 1963 (G-1, G-2). Reed filed the relinquishments on February 25, 1963. Bendixsen and Sargent were each paid \$265 on March 21, 1963, by Hood Corporation (G-134, G-135) and \$1,335 on January 22, 1965, for a total of \$1,600, or \$5 per acre for the 320 acres in each of their entries. Applications for desert land entries in Indian Hill were subsequently filed by other entrymen. Velma R. Blackwell, who became interested in the project through Shearman (Tr. 846), filed an application on July 18, 1963 (G-18). Margaret Nielsen and Roger B. Hougen, who acquired an interest through Reed (Tr. 1360, 1423), filed applications on July 16, 1963 (G-14, G-15).<sup>3</sup>

On March 1, 1963, Indian Hill Irrigation Company signed a contract with Hood Corporation to build the "necessary irrigation pumping plant, lift station and irrigation ditches to carry and distribute the irrigation water from the Snake River to said land, the initial phase of said program being the distribution of water to an initial 1,000 acres prior to May 1, 1963" (G-111). The contract provided also that "the total compensation for such work and services is \$125,000 which will be paid to [Hood Corporation] by [Indian Hill Irrigation Company] in full prior to May 1, 1963." At the same time, Reed and Michener executed a contract with Hood Corporation (G-112) in which Reed and Michener agreed "to complete all of said work [required by the Indian Hill-Hood construction contract] in accordance with the plans and specifications therefor by May 1, 1963," for a "total sum of actual cost plus \$30,000, but not to exceed \$117,000."

The construction of the irrigation system was then begun under the supervision of Reed and Michener who moved to Hammett, Idaho. Jolley commenced clearing the land and the Stewarts, in early March, began leveling and disking the land preparatory to planting crops (Tr. 702). The penstocks to carry water from the Snake River to the project, the engines, and pumps were installed. Canals and ditches were dug. A gravity flow irrigation system was constructed and on May 2, 1963, water was first delivered to the land. On March 13, 1963, while work was in progress, entry to the land of Raymond T. Michener, Marjorie K. Michener, Wallace Reed, Myrtle M. Reed, Joseph L. Nielsen, Robert R. Schwarze, George L. Crapo, Norma E. Barnes, Charles E. Barnes, and Blaine L. Garn was allowed by the land office. Entry by the Shearmans was later allowed on October 29, 1963.

Difficulties with the project immediately developed. The gas engines failed to operate properly and delivery of water was often interrupted. The engines were later returned to the manufacturer

<sup>3</sup> The Indian Hill project ultimately included several additional entrymen (G-16, G-17, G-19, G-20, G-21).

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and replacements were installed. Masterson became dissatisfied with Jolley's performance (Tr. 604). The Jolley-Ore-Ida Motors, Inc., partnership was, therefore, terminated on May 7, 1963 (G-340, G-352), and on May 31, 1963, Masterson, Jolley and Reed and Michener terminated their lease-option agreement. The Stewarts, however, continued with their farming operations under the terms of the sublease.

### *VI. Control by Hoodco Farms*

By the middle of the summer of 1962, it became apparent the farming operation was not going to be successful. At that time, Hood Corporation had expended approximately \$250,000 (Tr. 1645). Reed and Michener had lost their enthusiasm for the project and Shearman decided to take over the entire operation. Bernard M. Laulhere, president and co-owner of Hood Corporation, became concerned about the cost to Hood Corporation and sent the company's attorney, Morris Pfaelzer, to investigate (Tr. 1645). Pfaelzer arrived in Boise, Idaho, from his Los Angeles office in July 1963.

On July 16, 1963, Shearman, with advice by Pfaelzer, conducted negotiations to purchase the interests of Reed and Michener in the project. Pfaelzer left a conference between Reed and Michener and Shearman to study the Desert Land Law. He concluded from his examination that "whatever these men did, the one thing they couldn't do was to convey any interest in entries" (Tr. 1649). He advised the conferees that "you can discuss any kind of an arrangement you want here but first of all I am not going to be able to document it for you; and secondly, whatever you do you must comply with that section of the Act that inhibits your dealing in entries as though they were titles." (Tr. 1649). Reed, Michener and Shearman reached an agreement. They produced a memorandum notation concerning the agreement for Pfaelzer's inspection. This memorandum, written in longhand, stated:

4500 Ac. @ 50-----	225,000
Payoffs -----	25,000
200,000—Total price	
5,000—down	
25,000—when agreements signed	
30,000—when 1st 1200 Ac. proven	
70,000—when 3300 Ac. proven	
70,000—when 5 years	

Pfaelzer examined the document and asked Shearman if there was anything else to which they had agreed. He was advised that Reed and Michener were "agreeing they won't try to promote any other project of this nature within five miles of the Indian Hill project"

(Tr. 1654). Pfaelzer thereupon wrote in longhand on the bottom of the memorandum the words, "No filings within five (5) miles of borders of above area." The memorandum was then signed by Shearman, Reed and Michener.

Although this memorandum is a record of an agreement between the parties involving almost a quarter of a million dollars, the terms of the agreement and the conditions were never reduced to a written contract form. Reed, Michener and Pfaelzer testified that the \$200,000 indicated in the memorandum was the amount agreed to be paid to Reed and Michener. Although, Reed and Michener participated in the discussion and the agreement was, in turn, discussed with Pfaelzer and later explained to A. C. Kiser, none of them were able to explain what "payoffs 25,000," appearing on the memorandum, had reference to.

On July 16, 1963, Shearman issued a Hood Corporation check to Reed and Michener in the amount of \$5,000. The memorandum on the voucher portion of the check recited:

Down payment per verbal agreement this date on Section 16, T6S, R8E in Owyhee County, Idaho and all other interests agreed upon this date. (G-138)

On July 17, 1963, Pfaelzer employed A. C. Kiser, a Boise attorney, to document and implement the agreement reached between Reed, Michener and Shearman. Kiser was told that Reed and Michener were interested in salvaging what they could from the project and that Shearman desired to purchase the land of the entrymen (Tr. 1941, 2016). Pfaelzer regarded this desire "as purely a pipe-dream at this point" (Tr. 1941). Shearman was willing to see that Reed and Michener were compensated for what they had put into the project but wanted to receive the land in return. Pfaelzer recognized that Shearman couldn't get the land "at least until after it was patented" (Tr. 1942). Pfaelzer asked Kiser to "make a thorough study of this to be absolutely certain that what was being done here was being done within the framework of the desert land law" (Tr. 1943). Pfaelzer also told Kiser that he wanted to separate the operations connected with the desert land entries from Hood Corporation's construction business to preserve Hood Corporation's credit rating (Tr. 1944-1945). Kiser was, therefore, requested to form a new corporation, to be known as Hoodco Farms, as a subsidiary to the Hood Corporation.

Between July 17 and August 15, Kiser produced a volume of documents. These included:

- A. With reference to Hoodco Farms, Inc.
  1. Articles of Incorporation (G-98).
- B. With reference to Indian Hill Irrigation Company.
  2. By-Laws (G-96).
  3. Minutes of meeting of first meeting of incorporators predated March 10, 1961 (G-92).
  4. Minutes of a meeting of stockholders predated January 21, 1963 (G-89).

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5. Minutes of meetings of the directors predated March 10, 1961 (G-93), March 1, 1963 (G-91), June 21, 1963 (G-87).

6. Minutes of a meeting of stockholders dated August 14, 1964 (G-79).

C. With reference to Reed and Michener.

7. Offer to Reed and Michener dated August 31, 1963 (G-117).

D. With reference to the entrymen.

8. Agreements between Indian Hill Irrigation Company and entrymen predated February 19, 1963 (G-229, G-241, G-252, G-258, G-270, G-283, G-293, G-305, G-316, G-330).

9. Notes from entrymen to Indian Hill predated February 19, 1963 (G-231, G-239, G-247, G-263, G-272, G-284, G-299, G-301, G-311, G-318, G-331).

10. Mortgages from entrymen to Indian Hill predated February 19, 1963 (G-233, G-237, G-249, G-260, G-268, G-296, G-314, G-321, G-329).

11. Notes from entrymen to Hoodco Farms dated August 15, 1963 (G-232, G-240, G-248, G-262, G-273, G-285, G-295, G-312, G-317, G-333).

12. Mortgages from entrymen to Hoodco Farms dated August 15, 1963 (G-238, G-250, G-261, G-269, G-297, G-313, G-320, G-328).

13. Offers from Hoodco Farms to entrymen dated August 15, 1963 (G-118 to G-125).

14. Pledges of stock and proxies from entrymen to Hoodco Farms (G-370).

15. Agreements by Michener, Reed and Shearman to assume 1963 obligations of entrymen under February 19, 1963 agreements (G-235, G-243, G-257, G-267, G-277).

16. Water certificates obligating Indian Hill to furnish water to entrymen predated to February 19, 1963 (G-236, G-244, G-271, G-294).

*The Hoodco Farms Documents.* Articles of Incorporation of Hoodco Farms, Inc., were prepared and filed on August 5, 1963 (G-224). A Certificate of Incorporation was issued on the same day by the State of Idaho (Tr. 223).

*The Indian Hill Documents.* The documents with reference to the Indian Hill Irrigation Company were prepared to reflect the action which should have been taken by the company in order to be properly organized to conduct business, as well as the formal action which should have been taken in connection with the obligations and agreements of the company. The bylaws bearing a predated notarization of March 10, 1961, provided for the election of directors at an annual meeting of the stockholders, the powers and duties of the directors, corporate officers to be elected by the board of directors, the filling of vacancies among the directors by appointment by the remaining directors, and the issuance of stock certificates and the transfer of stock.



The minutes of the first meeting of the incorporators indicated that Reed, Sargent, Michener, Crapo and Schwarze had been elected directors on March 10, 1961. The minutes of the meetings of the directors indicated that Wallace Reed had been elected president, Hermen Sargent, vice president, and R. T. Michener, secretary-treasurer, on March 10, 1961; that the board of directors had approved the contract with Hood Corporation for the construction and the irrigation system for \$125,000 on March 1, 1963; that Wallace Reed had been elected president, C. R. Shearman, vice president, and R. T. Michener, secretary-treasurer on June 21, 1963.

Minutes of the meeting of the board of directors held August 23, 1963, approved the form of agreement predated February 19, 1963, substituted Laulhere, Ryan and J. B. Walhof on the board of directors to replace Reed, Michener and Crapo, and indicated the election of Shearman as president, Laulhere as vice president, and Ryan as secretary-treasurer.

*The February 19, 1963, agreements, notes and mortgages.* The agreements, prepared for execution by Indian Hill and each of the entrymen, recite that Indian Hill holds title to "water rights, pumps, canals, and other irrigation facilities \* \* \* which same facilities now exist and are suitable for pumping and delivering water \* \* \*" and that "there is no available source of funds for paying the outstanding indebtedness \* \* \* including sums owing or to become due and owing for the cost of construction, operations and maintenance \* \* \* ." The entryman's obligation under the agreements would be:

1. To pay his proportionate share of all costs of pumping and delivering water, including power, maintenance, operating costs, ditch riders, taxes and insurance.

2. To pay any additional sum each year reasonable and necessary to create a depreciation reserve required for equipment replacement, the amount to be determined by mutual agreement.

3. To pay a proportionate share of any payments required to be paid by Hood Corporation including those for needed capital improvements on "the existing facilities owned by [Indian Hill]."

Indian Hill's obligation under the agreements would be:

1. To use any or all of the depreciation reserve funds to meet the annual payments owing to Hood Corporation "for the furnishing and installation of the irrigation facilities owned by [Indian Hill]."

2. To furnish the entryman with his proportionate share of the total water pumped by use of Indian Hill facilities, so long as that entryman made the required payments.

Each agreement recites that it "supersedes any and all other agreements heretofore entered into between the parties" and the note and mortgage therein referred to "shall govern all of the rights, duties and liabilities between the parties." The accompanying note was for \$100 per acre with interest at 8 percent beginning one year after issuance of patent.

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It and the supporting real estate mortgage for the same amount were non-recourse, the entryman having no personal liability. In the event of default the only remedy of Indian Hill would be to foreclose the mortgage.

*The August 15, 1963, agreements, notes and mortgages.* The agreements prepared for execution by Hoodco Farms, Inc., and each of the entrymen recite that the entryman desires to employ Hoodco Farms to develop and improve his entry as may be necessary to enable the entryman to make necessary proofs and "otherwise prepare said lands for cultivation and irrigation for the sum of \$200 per irrigable acre." The entryman's obligation under the agreement was:

1. To pay \$200 for each irrigable acre evidenced by promissory notes secured by a second mortgage, and
2. To surrender possession of his entry for a period of up to 20 years.

Hoodco Farms' obligation was to develop and improve the entry in such manner and within such time as may be required by the desert land laws to meet the requirements of such laws to obtain patent.

Hoodco Farms had the right to farm the land for a period of 20 years beginning in 1964; to elect not to farm the land and declare the note, less 5 percent of its face value for each year farmed, due and payable. Hoodco Farms also assumed all amounts due which the entryman was required to pay under the agreement dated February 19, 1963, except the taxes. If Hoodco Farms elected to discontinue farming, the entire balance of the note, less 5 percent for each year farmed, would become due and payable within one year and bear interest at the rate of 7 percent per annum. The accompanying note was for \$200 per gross acres, secured by a mortgage in the same amount. The notes and mortgages were also non-recourse. Because under the agreements the entrymen would be liable for the water costs during the 1963 season, an "Assumption Agreement" was prepared for execution by Michener, Reed and Shearman under which they assumed these expenses.

*The August 15, 1963, offers.* The offers prepared by Kiser for each entryman, except Reed and Michener, recited that in consideration of the entryman's granting to Hoodco Farms the right to farm and develop his entry, Hoodco Farms offered to purchase the entry after patent and the entryman's stock in Indian Hill for \$10 per acre, or \$3,200 for a 320-acre entry. Hoodco Farms agreed not to withdraw the offer for a period of six months after patent.

The offer prepared for Reed and Michener and their wives, after reciting that they had heretofore transferred to Hoodco Farms title to section 16 for \$30,000, made three divisions of the entries. The first identified as Parcel I, consisted of the Raymond T. Michener, Wallace Reed, and Marjorie K. Michener entries. Parcel II consisted of the Charles E. Barnes, Norma E. Barnes, Crapo, Garn, Joseph L. Nielsen,

Myrtle M. Reed, and Schwarze entries. Parcel III consisted of the Blackwell, Hougén, Nielsen, Ollie M. Shearman and Charles R. Shearman entries.

Under the offer, Hoodco Farms agreed to pay Reed and Michener \$30,000 for the previously executed transfer of section 16; \$27,200 at the time Hoodco Farms obtains title to 1,200 acres in either Parcel I or Parcel II; \$44,000 at the time Hoodco Farms obtains title to all of the land in Parcels I and II; \$26,000 at the time Hoodco Farms obtains title to the lands in Parcel III; and \$70,000 to be paid in five equal annual installments after Hoodco Farms obtains title to all of the entries. The offer specified that Reed and Michener "shall not engage either directly or indirectly in the promotion or development of any desert land projects \* \* \* within a distance of 5 miles of the [entries]."

The documents prepared by Kiser were delivered to Reed in late August. On August 31, 1963, Reed picked up William O. Kepler, a notary public, and took him to the homes of the entrymen (Tr. 1413). The February 19 and August 15, 1963, agreements, notes and mortgages were signed by all, or most of the entrymen on August 31, 1963. None of the entrymen objected to the documents. Many signed without reading or understanding the contents, although Reed apparently, in at least some cases, explained their purport. Copies were not delivered to or requested by any of the entrymen. The first set of agreements recited that they were "made and entered into on February 19, 1963," and were notarized as having been signed on that date. None of the entrymen protested or raised objection to the predating of the documents.

Signatures were obtained on the bylaws and minutes of meetings prepared for Indian Hill Irrigation Company. The offers to the entrymen for the purchase of the entries after patent were signed by Shearman, attested to by Ryan, and delivered to Reed. These offers were not presented to the entrymen nor were they informed of their existence. Each of the entrymen signed a pledge of Indian Hill stock and a voting proxy to Hoodco Farms.

The executed stock pledge agreement gave Hoodco Farms control of Indian Hill Irrigation Company. The minutes of the meeting of the board of directors dated August 23, 1963, placed Hood and Hoodco Farms officials in charge of Indian Hill operations. The Indian Hill records had been delivered to Shearman, and Ryan, as secretary-treasurer of Indian Hill, set up and maintained the accounts in addition to his similar duties with Hood and Hoodco Farms.

### *VII. The Constructed Irrigation System*

After the agreement between Shearman, Reed and Michener, Hoodco Farms took over the farming operation on Indian Hill project

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and continued the construction and development of the irrigation system. The system now consists of a pumping plant on the Snake River powered by four natural gas engines, five vertical turbine pumps, three 26-inch diameter pipes leading from the Snake River up the hill a distance of about 1,350 feet and discharging into a reservoir (Tr. 197). Two 20-foot lift canals lead from the reservoir, one extending west to a distance of about 6,700 feet on the boundary between entry 012241 and 012235 and traversing through entry 012234. The other canal extends south a distance of 9,000 feet through entries 012235, 012242, and section 16 (Tr. 196). Buried main lines located every 50 feet lead from the canals to which are attached lightweight aluminum pipe three and four inches in diameter. Gas powered booster pumps along the canals furnish the pressure for the irrigation sprinkler system (Tr. 197). The irrigation system is generally adequate to serve the lands within the entries as well as section 16 (Tr. 209).

The reasonable cost of the facilities now on the project, including the engines of the pumping plant on the river, pipeline up the hill, the reservoir, the canals, pumping facilities and the buried main lines and surface sprinkler lines, is \$948,618 (Tr. 214). The reasonable development cost, clearing of sagebrush, plowing and developing into irrigated lands would be about \$105,740 (Tr. 215). This cost would cover 1,500 acres actually leveled and graded for surface irrigation. The estimated total value of the land development and the irrigation system would be \$243 per acre (Tr. 218-219).

The irrigation system was not constructed so that the entries could be farmed as individual units (Tr. 230). Many of them do not have access roads and there are no rights-of-way for roads, canals and pipelines. No measuring devices were installed in the system by which water costs could be allocated (Tr. 220). The installation of measuring devices on each of the service lateral lines would be required in order to allocate water costs to the individual entries. Such an installation is not economically feasible (Tr. 231).

#### *VIII. The Final Financial Agreements*

On July 2, 1963, Wallace Reed, Joseph L. Nielsen, Schwarze, Myrtle M. Reed and Crapo signed notices of intent to make final proof. In accordance with the established procedure, the Boise Land Office Manager issued a "Notice for Publication" on July 10, 1963. The publication of notice of intent to make final proof was requested by Ryan in a letter to the Glens Ferry Gazette dated July 17, 1963 (G-338), and paid for by Hoodco Farms on October 11, 1963 (G-146-1).

Since the Articles of Incorporation of Indian Hill stated, "the company cannot deliver water to anyone who has not purchased one share of stock of the corporation for each acre or fractional part thereof of

irrigable land within the area served by the corporation" the land office, on October 22, 1963, requested submission of certified copies of the shares of stock owned by the entrymen in Indian Hill in order to complete their final proof (G-11-35). The land office letter stated:

Before your entry was allowed you submitted a statement saying that you had subscribed to 320 shares of the company. On your final proof you stated that you owned 320 shares of the company.

It will be necessary for you to submit certified copies of the shares of stock owned by you in the Indian Hill Irrigation Company. Because of the strict and prohibitive wording in the company's articles of incorporation we cannot accept the water certificates as your legal and permanent evidence of a water right.

The stock certificates were then prepared by Hoodco Farms' attorney (Tr. 1989-1990) and were submitted by Reed on October 30, 1963. They were predated March 10, 1961, and signed by Reed as president. Reed was not, at the time of signing, an officer in Indian Hill. The certificates state they were "Fully Paid" and "non-assessable." The stock had never been fully paid by the entrymen. They made no payments that were designated as being for the purchase of stock. The entrymen's attorney submitted final proof for Wallace Reed, Myrtle Reed, Joseph L. Neilsen, Schwarze and Crapo on September 26, 1963 (G-9).

The Desert Land Law requires a payment of \$1 per acre with final proof. Reed and Michener advanced money to make final proof (Tr. 1339). These advances were described as loans (Tr. 890-892; Tr. 1378-1379), but there is no evidence that repayment was ever requested or made.

On the basis of the Director's August 14, 1964, decision, patents were issued to Wallace Reed, Myrtle Reed, Schwarze and Crapo on September 3, 1964, and to Nielsen on September 12, 1964. The entrymen delivered their patents to Reed or Michener (Tr. 895-896; Tr. 1392-1395). They were in turn given to Ryan who sent them to the Owyhee County Recorder on September 23, 1964 (G-153) with Hoodco Farms checks to cover the recording fees (G-149, G-150). Ryan requested that the patents be returned to him. They were never returned to the patentees after recordation (Tr. 896; Tr. 1394).

Charles Shearman was killed in an airplane accident on March 27, 1964 (Tr. 1500). Up to the date of his death he was in control of the Indian Hill project, personally directing the installation of the irrigation system and the grading of the land (Tr. 1502). Laulhere succeeded to sole control of Hood and Hoodco Farms and subsequently obtained Shearman's interest (Tr. 1506). A few days after Shearman's funeral (Laulhere discussed the problems in Indian Hill with Harvey Proctor, vice president of Southern California Gas Company, with the intention of interesting him in taking over the farming operation (Tr. 1504). Proctor had agricultural experience as an operator of an orange grove in California (Tr. 1504). After

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visiting the area, Proctor, in late 1964, agreed to take over the farming operation and incorporated the Virginia Agricultural Products Company in California for that purpose. The company was wholly owned by Proctor and his wife. Virginia Agricultural purchased 20 percent of the stock of Hoodco Farms (Tr. 733). Proctor became executive vice president of Hood Corporation and president of Hoodco Farms in the early part of 1965 (Tr. 731). He assumed the supervision of the Boise operation of Hood and had full responsibility for the Indian Hill farming operation (Tr. 732).

Laulhere wished to obtain a loan for more than the \$125,000 offered by Travelers Insurance. He opened negotiations with Northwestern Mutual Life Insurance Company seeking additional financing. On May 29, 1964, Northwestern Mutual Life Insurance Company made a commitment for a loan of \$1,200,000 which was later, on March 8, 1965, reduced to \$705,000 (C-4). Under Northwestern's commitment, the loan would be disbursed when 4,461 acres were patented of which not less than 3,525 acres were developed and equipped for irrigation. The commitment provided that if any entryman desired to repay all of his indebtedness to Indian Hill Irrigation Company and Hoodco Farms during the term of the loan, his land would be released from the mortgage and assignment on payment of not more than \$300 per acre plus a premium of 5 percent (C-4).

The initial portion of the loan was to be for \$200 an acre on 753 acres owned by Hoodco Farms and 1,500 acres owned by the five patentees, rounded to a total of \$460,000. The loan was to be secured by a real estate mortgage by Hoodco Farms to Northwestern on the section 16 land purchased from Reed and Michener, 753 acres of Hoodco's patented land, the mortgagor's rights to 1,500 acres of land of the five patentees, the sprinkler system and irrigation facilities owned by Hoodco, assignment of all of the notes, mortgages and stock pledges of the five patentees, and a note from Indian Hill to Hoodco in the amount of \$464,860. The loan was to be guaranteed by Hood Corporation and Laulhere. The proposed loan would be for 20 years to be paid in annual installments and bear an interest rate of 6 percent.

On January 22, 1965, Reed and Michener entered into a new agreement with Hoodco Farms concerning the entries (G-126). Hoodco agreed to pay Reed and Michener \$17,419.17 for delivery to Virginia Agricultural of \$10 per acre options on the entries of the five patentees; \$24,386.33 for delivery to Virginia of \$10 per acre options on entries of Charles E. Barnes, Norma Barnes, Garn, Marjorie K. Michener, Raymond T. Michener, Charles Shearman Estate and Ollie Shearman (provided that if Shearman entries are granted prior to January 1,

1983, these options need not be obtained), and \$56,000 in five equal annual installments after obtaining these options; \$29,596.80 for delivery to Virginia of \$10 per acre options on entries of Blackwell, Hougén and Margaret Nielsen to be paid on annual installments; and an additional \$1,300 for the Hougén or Nielsen options. The total payment under the contract was \$128,702.30.

On January 19, 1965 (prior to the new agreement with Hoodco), each of the patentees executed an option agreement and a deed of his entry to Virginia Agricultural (G-360 to G-364). The agreements granted Virginia Agricultural the option of purchasing the desert land entry for \$10 an acre subject to the February 19, 1963 notes, mortgages, and agreements between the patentees and Indian Hill and the August 15, 1963 notes, mortgages and agreements between the patentees and Hoodco Farms. On January 22, 1965, Reed and Michener's attorney delivered the documents to an escrow agent, the attorney for Northwestern Mutual. The option was completed by Virginia Agricultural on March 9, 1965. The purchase money, amounting to \$15,600, was deposited with the escrow agent on May 7, 1965 (G-356, G-359).

### *IX. The Good Faith of the Entrymen*

The first two issues, (1) whether each entry was made and is maintained with no intent on the part of the entryman to reclaim the lands and is not maintained in good faith as required by section 1 of the act of March 3, 1877 (19 Stat. 377, 43 U.S.C. sec. 321), and (2) whether patents issued to Wallace Reed, Joseph L. Nielsen, Robert R. Schwarze, Myrtle M. Reed, and George L. Crapo were erroneously issued or obtained by fraudulent or improper means, are related and will be discussed jointly.

The intent of an entryman under the Desert Land Law is a controlling factor as to good faith and legality of the entry. The law states (43 U.S.C. sec. 321), "It shall be lawful for any citizen \* \* \* to file a declaration \* \* \* that he intends to reclaim a tract of desert land \* \* \*." "That intention is the very essence of the condition on which his entry is permitted." *Chaplin v. United States*, 193 Fed. 879, 881 (CA DC 9, 1912), *cert. denied*, 225 U.S. 705.

The Government contends that the entrymen had no intention of reclaiming at the time they filed their desert land applications as evidenced by the preparation of the application by Reed and Michener from facts not known by the entrymen, by acceptance of all planning of how their entries were to be reclaimed and irrigated by Reed and Michener, and by their lack of knowledge of the requirements for entry. The use of services of persons knowledgeable in reclamation of desert land and reliance upon them in the development of plans is not inconsistent with a bona fide intent to reclaim. At the time of filing of their applications the entrymen had before them a plan for

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reclaiming which, on its face at least, appeared practical and within their financial abilities. They were to obtain the necessary funds through a 40-year loan under the Small Reclamation Projects Act. If this loan had materialized the entrymen might well have reclaimed the land through their own collective efforts. At least they intended to do so.

Their intent, however, changed. This change occurred at the meeting of February 12, 1963. The entrymen there decided to abandon further efforts to obtain the reclamation loan and to follow another course. The testimony concerning the meeting is somewhat indefinite. The witnesses were either reluctant to testify with specificity or had an inexact recollection of the discussion. The evidence definitely established (1) that the entrymen were presented with an alternative and (2) that one of their choices was to pay \$983 in cash and assume a \$12,000 to \$14,000 personal risk. The other alternative was the signing of mortgages, notes and leases. A memorandum notation of the meeting made by Michener (G-367) stated:

Proposal to develop ground through a Travelers loan explained by Wallace Reed. Members asked to decide within 10 days whether they wished to participate.

In order to participate they would:

Put up 983.00 in cash

Assume 12—\$14,000 risk

If they did not participate members were asked to either relinquish their filings or sign mortgages, notes and leases covering the costs of development.

Meeting adjourned at 9:30 p.m.

It is apparent, however, that the alternatives presented to the entrymen involved something in addition "to signing mortgages, notes and leases covering the costs of development." The entrymen knew from the first that they were going to mortgage their entries as evidenced by the statement of "Financial Condition" made to the Bureau of Reclamation (C-16-2). Furthermore, it would hardly have been necessary to ask the entrymen whether, in order to continue to participate in the project, they preferred to pay \$1,000 in cash and assume a personal risk of from \$12,000 to \$14,000, or to sign non-recourse notes and mortgages. Two of the entrymen testified concerning payment of \$10 per acre for their entries. Schwarze stated:

At this meeting that you referred to that you asked me of, where the first agreements were signed, there was some discussion along that line, and as near as I can recall someone asked Wally at that meeting, "Suppose this thing really goes sour, the whole project is a failure, costs too much money, or something, not feasible, what will happen? And Wally, the words he used I don't remember but there was something about \$10 an acre brought up. He felt we could certainly realize that much out of it. Now that's real vague but I do have a recollection of \$10 there brought up. There was nothing firm, I don't think anybody felt it could be interpreted as an offer in any way. (Tr. 1467-1468)



Garn was more definite. He testified:

It was my understanding that Reed and Michener were going to go ahead and develop or try to develop the project on their own with their own money and they would pay us \$10 an acre for ground undeveloped prior to patent. Now whether it was that way or not I do not know; but that was my understanding of it. (Tr. 1100)

He also stated:

I knew I couldn't sell, or turn something over to them until I gained patent, and I didn't think it would be until after patent. But I didn't think I had any alternative on the matter. (Tr. 1101)

From this testimony it is apparent that acceptance of \$10 an acre was tied in with the second alternative presented to the entrymen at the meeting and was made a condition for their participation which would account for Norma Barnes' statement that "it was my understanding from there on that I had lost my hopes of ever having the income from the land that I had ever anticipated" (Tr. 1018). This would also account for the fact that Schwarze, Bendixsen and Sargent decided to abandon further participation which would not have been otherwise logically motivated. The entrymen, therefore, abandoned their original intent and decided to deliver their entries to others for reclamation and to accept \$10 an acre when title could be transferred to the developers. Each of the entrymen testified that they did not enter into any agreement to sell their entries, either before or after patent. In the sense that no formal or written agreement was executed, this testimony was undoubtedly true. Nevertheless, they reached an understanding with Reed and Michener on February 12, 1963, that they would sell after patent and for \$10 an acre.

The existence of such an understanding or agreement provides motivation for subsequent actions of principals involved in the development of Indian Hill which would otherwise be inexplicable. These actions include (1) the agreement with Jolley-Ore-Ida Motors, (2) the agreements with Shearman, (3) the method of recording the Shearman transactions on the accounting records of Hoodco Farms, and (4) the documentation of the transactions. The existence of the understanding or agreement to sell for \$10 per acre also explains:

(1) Why the figure of \$10 per acre appears consistently and without variation throughout the subsequent developments and documentation—in the February 18, 1963 Lease and Land Development Contract with Indian Hill (G-374); in the offers of Hoodco Farms to the entrymen of August 15, 1963 (G-118 to G-125); in the options to Virginia Agricultural of January 19, 1965 (G-360 to G-364); in the accounting records of Hoodco Farms (G-114).

(2) Why the entrymen would obligate their entries for \$300 per acre without any obligation on the part of the developers to expend a stipulated amount on the project.

(3) Why the entrymen would execute series of documents without a single protest of record, in many instances without understanding the contents and without retaining copies for their own files.

(4) Why the patentees finally sold their entries for \$10 per acre without an arm's length negotiation of the selling price or even any direct contact with the purchasers.

(5) Why Hoodco Farms rather than the entrymen paid the publication fee, the recording fee, and reimbursed some of the patentees for their payments made in connection with their entries.

(6) Why the patents were collected by Reed and retained by Hoodco Farms after issuance.

All of the foregoing actions are inconsistent with bona fide intent to reclaim the land for the entrymen's own use or their own maximum benefit.

*The Jolley-Ore-Ida Agreement.* Reed and Michener negotiated the "Lease-Option Agreement" (G-350, C-28) with Jolley and Masterson, obtained their understanding or agreement with the entrymen, and then signed the contract (G-4-23). The document provided in part:

*Purpose and Scope*

It is the purpose and scope of this agreement to define the terms of a crop share lease with options to buy the following described lands and filings in Owyhee County, State of Idaho, near Hammett, Idaho, to wit: [the Indian Hill entries and section 16]

*Term*

The term of the Lease-Option shall be five (5) years, except as modified under the provisions of "Options".

\* \* \* \* \*

*Availability of Titles*

Lessors warrant that a firm title can be furnished by them to Section 16. As to the balance of the area, Lessors warrant that the same is held under desert land entries and that title can be furnished upon the Lessees furnishing a bona fide entryman as purchaser. It is agreed that the Lessees may take a long term renewable lease extending to the patent and supported by a mortgage covering the development costs on the desert land entry.

*Purchase Prices*

It is agreed that the purchase prices per developed acre shall be as follows:

\$200.00 to May 1, 1963.

\$200.00 plus Lessors' 1963 crop share to January 1, 1964; providing that at least 500 acres have been purchased or long-term leased at this time, the options continue as follows:

\$250.00 to May 1, 1964.

\$250.00 plus Lessors' 1964 crop share to January 1, 1965; providing that a total of at least 1500 acres have been purchased or long-term leased by this time, the options continue as follows:

\$250.00 to May 1, 1965.

\$250.00 plus Lessors' 1965 crop share to January 1, 1966.

All of the above prices are subject to a 5 percent discount.

The Lease-Option Agreement also provided that Jolley-Ore-Ida was to receive three-fourths of the potato crop, one-half of the grain, one-half of the hay, one-half of the alfalfa seed, and three-quarters of the beets. Reed and Michener agreed to provide one serviceable road, to pay the cost of leveling the land and ditches, and \$5 per acre for the first plowing. The agreement could be terminated by mutual consent of the parties, by Ore-Ida Motors upon notice by December 1, or by Reed and Michener if their gross return fell below \$50 per cropped acre.

The Government contends (Gov't Brief, p. 21-22, and Gov't Reply Brief, p. 9-13) that the agreement was a contract to sell the desert land entries.<sup>4</sup> The contestees argue (Shearman Brief, p. 14-17) that this was merely an agreement for the substitution of entrymen.

The agreement is so indefinitely worded as to leave the intent and purposes of the party open to construction. The terms "with options to buy" and "purchase prices," "leases or sales," and a stipulated "purchase price" as used in the agreement indicate an intention to sell. The stipulated amount of from \$200 to \$250 an acre is definitely directed to a sale of the entries. The payment for each 320-acre entry would be either \$64,000 or \$80,000 depending when the option was exercised. The parties could not conceivably have contemplated payment in this amount for the mere privilege of substituting bona fide entrymen. The substitution of a bona fide entryman would have been of no benefit to Jolley and Masterson. The agreement must, therefore, have contemplated either a sale of the entry or the substitution of entrymen under the control of Jolley and Masterson for entrymen controlled by Reed and Michener. In either case, Masterson and Jolley were looking toward the reclamation of the entries for the purpose of acquiring ownership.

The contestees argue (Shearman Brief, p. 14-16) that the Masterson-Jolley agreement did not constitute an enforceable instrument in view of its loose and imprecise language; that, at most it constituted only a purported offer which, in fact, was never accepted; and that none of the entrymen had authorized Reed and Michener to sell their

<sup>4</sup>The brief filed on behalf of the Government will be referred to as "Gov't Brief" or "Gov't Reply Brief;" that filed on behalf of Ollie Mae Shearman and the Estate of Charles R. Shearman, Raymond T. Michener, Marjorie K. Michener, Wallace Reed, Joseph L. Nielsen, Robert R. Schwarze, Myrtle M. Reed, and Hoodco Farms, Inc., as the "Shearman Brief;" and that filed on behalf of Charles E. Barnes, Norma E. Barnes, Blaine L. Garn and George L. Crapo as the "Barnes Brief."

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entries. This may very well be. But what we are here dealing with is the good faith and intent of the parties in their relationship with the Government. The evidentiary importance of the agreement does not lie in its legality or enforceability, but in what its execution discloses as to good faith and intent.

After the February 12, 1963, understanding, the entrymen signed leases under which they would receive \$10 an acre for their entries. Reed and Michener were convinced that they had sufficient control of the entries or of the entrymen that they could execute an agreement with Jolley and Masterson which gave Reed and Michener, not the entrymen, a share of the crop grown on the entries and which also provided for the payment to Reed and Michener, not the entrymen, of from \$200 to \$250 in the event of transfer of ownership of the entries. The subsequent developments demonstrate that they actually did have such control. When five patents were ultimately issued, Reed and Michener promptly delivered them to others and, in due course, delivered deeds to the entries for which the entrymen were to receive \$10 per acre in accordance with the understanding and intent acquired at the February 12, 1963 meeting. Obviously, the entrymen had agreed to have others reclaim the land and to retain the benefits of reclamation other than the \$10 per acre. They were no longer acting in good faith with an intent through their own efforts or ingenuity to reclaim the desert land in their entries. All of this occurred prior to March 13, 1963, when the entries were allowed by the land office and, for the first time, the entrymen had the right to make entry and begin reclamation.

*The Agreements With Shearman.* At the time that Reed and Michener signed the Masterson-Jolley lease-option agreement in February 1963, Shearman acquired one-third of the Reed and Michener interest. The Government argues that that interest at this point was the right to the development and the farming of the project which is equated with "ownership" (Gov't Brief, p. 36, 106). The contestees claim that, "The record shows that any purported understanding among Reed and Michener and Shearman that amounted to a 'partnership' pertained only to the 1963 crop" (Shearman Brief, p. 48). What Shearman did acquire for his agreement to finance the project was one-third of the total interest he obtained by his subsequent agreement in July 1963 when he assumed the entire responsibility for the development of the irrigation system.

The July 1963 agreement between Shearman and Reed and Michener is evidenced by a longhand memorandum (*supra*, p. 27). This memorandum discloses an agreement by Shearman to pay Reed and Michener, with reference to an interest in 4,500 acres of Indian Hill land, \$200,000 in installments with an additional \$25,000 in "payoffs,"

and an agreement by Reed and Michener not to promote desert land filings "within five (5) miles of the borders of" the Indian Hill entries.

The contestees argue that the \$200,000 was payment for past services of Reed and Michener or "the amount Reed and Michener had in [the project] that Shearman was to recognize and payoff," (Tr. 1652; Shearman Brief, p. 20). But the agreement to pay \$200,000 to Reed and Michener could not have been for what they had in the project. At that time, Reed's and Michener's contribution had been (1) the development of the engineering plans upon which they had placed a value of \$12,000 in the report to the Bureau of Reclamation (C-16-2), (2) the construction of the irrigation system under a contract with Hood Corporation which would provide them with a hoped-for profit of up to \$30,000 and which provided Hood with a possible profit of \$8,000, and (3) a farming contract with Masterson and Jolley under which they expected to receive a return on a share of the crop. Shearman would hardly have been willing to pay \$200,000 for the engineering and planning activities of Reed and Michener and their disappointment at not making a profit on the construction and farming contracts when Shearman himself had shared in that disappointment. The memorandum agreement, however, is fully explained by one of the documents drafted to make that agreement effective. The August 31, 1963, offer from Hoodco Farms to Reed and Michener (G-117) shows on its face what the \$200,000 payment was for. Under that document, Hoodco Farms agreed to pay Reed and Michener:

\$30,000 for Section 16

27,200 for delivery of title to 1,200 acres of land in the entries

44,000 for delivery of title to an additional 1,840 acres

96,000 for delivery of title to the remaining land in the Indian Hill project, \$26,000 to be paid upon performance and the remainder to be paid in equal annual installments.

The agreed payments total \$197,200. Kiser, who prepared the document, testified that the difference between \$197,200 and the \$200,000 is represented by the \$2,800 offer made to Myrtle Reed in another document (Tr. 1981). Other documents executed by Hoodco Farms at the same time offered to pay the entrymen \$10 per acre for title to the land in their entries, which explains the "payoffs 25,000" in exhibit G-115. The entrymen executed the notes, mortgages and agreements dated February 19, 1963, and August 15, 1963, which effectuated the July 1963 agreement between Reed and Michener and Shearman and placed Shearman in complete control of the land. This constitutes further proof of lack of intent of the entrymen to reclaim.

*Recording of the Transactions.* There is further substantial evidence of the ultimate purpose of the documentation. The financial liability that resulted was recorded on the books of Hoodco Farms by

Ryan. Under date of August 31, 1963, Ryan made the following entry in the accounting journal of Hoodco Farms (G-114-1):

Date	Item description	Debits	Credits
Aug. 31-----	Irrigated land-owned-----	\$244, 312	-----
	Contracts payable-----	-----	\$232, 000
	State contracts-----	-----	12, 312
	To record the accepted offer of Hoodco Farms, Inc. to Wallace Reed, Raymond T. Michener et al. for purchase of lands.		

The \$12,312 is the unpaid amount due to the State of Idaho for the section 16 land. The \$232,000 credit represents the \$197,000 agreed to be paid to Reed and Michener and the \$10 per acre agreed to be paid to the entrymen. This amount was posted as a liability on ledger accounts (Account No. 203) entitled "*Contracts Payable*" under the names of the individual entrymen as follows:

Exhibit No.	Contracts payable	Amount
G-114-47-----	Charles E. and Norma E. Barnes-----	\$6, 400
G-114-48-----	Warren J. Bendixsen-----	1, 600
G-114-50-----	Velma R. Blackwell-----	3, 200
G-114-53-----	George L. Crapo-----	3, 200
G-114-54-----	Blaine L. Garn-----	3, 200
G-114-55-----	Roger B. Hougen-----	3, 200
G-114-56-----	Joseph L. and Margaret Nielsen-----	6, 400
G-114-57-----	Reed and Michener-----	197, 200
G-114-58-----	Myrtle M. Reed-----	2, 800
G-114-59-----	Charles H. Sargent-----	1, 600
G-114-60-----	Robert R. Schwarze-----	3, 200
Total-----		\$232, 000

The \$244,312 appears on Hoodco Farms' Balance Sheet of October 31, 1963 (G-209), as:

Irrigated Land-Owned

5,288.8 Acres @ 46.19—\$244,312.

Ryan testified he had no information that the offers of August 15, 1963, had been accepted (Tr. 349, 1698) and made his entries on the assumption that they would be (Tr. 349). The contestees contend that the bookkeeping entries should not be accepted as reflecting a sale of the entries over the testimony of several witnesses that the entrymen had never sold or contracted to sell their entries prior to patent (Shearman Brief, p. 30-32). Ryan's bookkeeping entries would not create any liability for Hoodco Farms that did not otherwise exist. Nevertheless, they disclose what was or was to be achieved by the execution of the documents prepared by Kiser in July and August 1963. Ryan clearly stated the intent in Hoodco Farms' books by the entry that the purpose was "to record the accepted offers of Hoodco Farms due to Wallace Reed, Raymond T. Michener et al. for the purchase of the lands." At the time Ryan made this entry he was in a position to know what was intended by the agreement between Reed, Michener and Shearman. He was an officer in the company.

At the time the entrymen were permitted to make entry they did not intend, through their own efforts, to reclaim the desert land in their entries. What they did intend was to transfer possession and control for reclamation by and for the benefit of Hoodco Farms.

The contestees point to the fact that none of the documents can be construed as a contract to sell any of the Indian Hill entries (Shearman Brief, p. 29) and argue that this is indicative of the good faith of the entrymen. Since the entrymen were well aware that they could not make executory contracts to convey title to their entries it would have been strange indeed if they had done so. But the absence of such agreements does not preclude inquiry into the purposes and results of the documents that were executed.

Those documents placed Hoodco Farms in a position, as a practical matter, of forcing a sale of the entries after patent. Hoodco Farms could elect not to continue to farm the entries. Such an election would require payment by the entrymen of their notes (amounting to \$96,000 in the case of a 320-acre entry). They were not in a financial position to do so. Even if they had been financially able to retire the notes, ordinary prudence would have prevented such action. Considering the results for the entrymen as a group, the notes for 3,688 acres would have required payment of a little over \$1,100,000. For this, the entrymen would have received unencumbered possession of their entries. They would have received stock and become only part owners of the Indian Hill Irrigation Company since, by then, the project had been expanded to include several other entrymen. The Indian Hill Irrigation Company would own part of an irrigation system valued, ac-

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cording to Indian Hill's Balance Sheet as of June 30, 1965, at \$481,130.10. Hoodco Farms would own the engines and the laterals necessary for operation of the system. As part owners of a part of an irrigation system, the entrymen would have been in a position of having to negotiate with Hoodco Farms for the purchase or rental of the remaining portions of the system.

Even after obtaining the use of the remaining portion of the system, the entrymen still could not farm their lands without further substantial expenditure. Since the system had never been designed to permit farming of individual entries, it would have had to be reconstructed and meters would have to be installed. In addition, the entrymen would have had to construct access roads to serve their entries. Any individual entryman who wished to redeem his entry would be in a far more unfavorable position. He would have had to bear all of the reconstruction and road building costs. The expense involved makes the redemption economically unsound.

The documentation of the transaction between the entrymen and Hoodco Farms gave the corporation the power of acquiring the entries after patent had been issued. The offers of August 15, 1963, and the mortgages, notes and agreements dated February 15 and August 15, were drafted for the purpose of achieving by indirection what the Desert Land Law proscribed.

The contestees assert that to prevail on the issue of bad faith the Government must prove that the entrymen intended to enter as dummies for others at the time of filing their applications and that a change of intent after application is immaterial (Shearman Brief, p. 32). They rely upon *Williamson v. United States*, 207 U.S. 425, 460, 461 (1908) and *United States v. Biggs*, 211 U.S. 507, 521 (1909).

The *Williamson* case, *supra*, arose on a charge of conspiracy to commit a subornation of perjury under the Timber and Stone Act. The perjury was based upon an affidavit required by the Commissioner of the General Land Office in relation to final proof, which affidavit was not provided for in the statute. The Supreme Court held that the Commissioner could not require such an affidavit in the absence of a provision in the statute and, therefore, dismissed the charge. The Court stated:

It remains only to consider whether it was within the power of the Commissioner of the General Land Office to enact rules and regulations by which an entryman would be compelled to do that at the final hearing which the act of Congress must be construed as having expressly excluded in order thereby to deprive the entryman of a right which the act by necessary implication conferred upon him. To state the question is to answer it.

\* \* \* Indeed, we cannot perceive how, under the statute, if an applicant has in good faith complied with the requirements of the second section of the act, and



pending the publication of notice, has contracted to convey, after patent, his rights in the land, his so doing could operate to forfeit his right.

In the *Biggs* case, *supra*, the Government sought to prove a conspiracy to defraud the United States on the basis of a contract to sell a Timber and Stone Act entry which was entered into after entry but prior to patent. The Court said:

It is insisted by the Government that, however conclusive may be this ruling as to the power of the applicant to sell after application and to perfect his entry for the purpose of enabling him to perform such contract, that such ruling does not conclude the contention that a conspiracy formed to induce an entryman who has made his application to purchase subsequently to agree to convey his interest in the land would be a violation of the statute. But we are constrained to say that this is a mere distinction without a difference. The effect of the ruling in the *Williamson* case was to hold that the prohibition of the statute only applied to the period of original application, and ceased to restrain the power of the entryman to sell to another and perfect his entry for the purpose of transferring the title after patent.

The Timber and Stone Act (20 Stat. 89 (1878)) since repealed (69 Stat. 434 (1955)), unlike the Desert Land Act, contained no expression of congressional intent to restrain alienation after entry. However, aside from this distinction, the Court assumed that the entryman had acted in good faith or had complied with the requirements of the statute. Neither of the decisions is factually analogous to the instant proceeding. Neither would support the conclusion that an understanding or agreement to surrender possession and control of a desert land entry for reclamation and ultimate acquisition by a corporation would receive the blessing of the Court.

Both the *Williamson* case, *supra*, and the *Biggs* case, *supra*, were discussed and construed in *Chaplin v. United States*, 193 F. 879 (CA DC 9, 1912), *cert. denied*, 225 U.S. 705 (1912), a criminal prosecution for conspiracy to defraud. In *Chaplin*, the Court states (at page 882):

The cases of *Williamson v. United States*, 207 U.S. 425, 28 S. Ct. 163, 53 L. ed. 278, and *United States v. Biggs*, 211 U.S. 507, 29 S. Ct. 181, 53 L. ed. 305, cited by the plaintiffs in error, decided no principle applicable to the case at bar. In the *Williamson* case it was held that under the Timber and Stone Act, after an applicant has made his preliminary sworn statement concerning the bona fides of his application, and the absence of any contract or agreement in respect to the title, he is not required to swear again to such facts on final proof, and that a regulation of the Land Commissioner exacting such an additional statement at the time of final hearing is invalid. \* \* \* In the *Biggs* case it was held that, while the Timber and Stone Act prohibited an entryman from entering land ostensibly for himself but in reality for another, a conspiracy formed to induce an entryman who has made in good faith his allegations to purchase subsequently to agree to convey his interest in the land was no violation of the statute. In *Adams v. Church*, 193 U.S. 510, 24 S. Ct. 512, 48 L. ed. 769, under the provisions of the Timber Culture Act, which act, as does the Desert Land Act, requires the applicant to make affidavit that his entry is made for the cultivation of timber for his exclusive use and benefit, and

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that the application is made in good faith and not for the purpose of speculation or for the benefit of another person, the Court recognized the right to assign "if the entryman has complied with the statute and made the entry in good faith in accordance with the terms of the law and the oath required of him upon making such entry, and has done nothing inconsistent with the terms of the law." In brief, it is clear from the authorities that an entry upon the public lands made not in good faith, or in evasion of the provisions of the law, is a fraud upon the government and a combination of two or more persons to induce others to make such entries is a conspiracy punishable by section 5440 of the Revised Statutes (U.S. Comp. St. 1901, p. 3676).

*Jones v. United States*, 258 U.S. 40 (1922), is a suit brought to recover the value of lands allegedly obtained from the United States through fraudulent inducement and deals with a situation similar to this case. Justice Holmes, speaking for the Court, stated (at p. 47-48):

We may assume for the purposes of decision that the agreement and mortgage were not unlawful on their face and that the defendant took pains to make them known to the authorities; but obviously they might be made an instrument for the scheme alleged. They were prepared in contemplation of a plan to collect old soldiers for the purpose of making entries, the defendant paying an agent five dollars a piece for every contract brought in. The defendant admitted that he looked to the land, not to the soldiers, as his security, and that he supposed the soldiers would sell the land to pay their debt to them. The land was timber land. There was evidence that the soldiers were not intending to make their residence upon it; that the agent employed to get their contracts knew that they were not intending to; that the defendant treated the intent as matter of indifference, and in his conversations with the agent indicated an expectation to get the land for himself or his nominees without the need for a preliminary contract to sell to him. He did get four of the nine parcels. Without going into details it is evident from the way in which the whole business was transacted that all hands proceeded on the notion that if the entrymen put in a periodical appearance on the land they would get it, and that no one troubled himself about actual intent provided the affidavits were in due form. It is impossible to say that the evidence did not warrant finding the defendant guilty of fraud.

At the time that entry was made on the desert lands on Indian Hill the entrymen were not acting in good faith but with intent to evade the provisions of the law. The patents were, therefore, erroneously issued and obtained by fraudulent and improper means. As the Court stated in the *Chaplin* decision, *supra*, "It is clear from the authorities that an entry upon the public land made not in good faith, or in evasion of the provisions of the law is a fraud upon the government."

#### X. *The Holding by a Corporation*

The next two issues, whether the agreements, notes and mortgages between the entrymen and Hoodco Farms, Inc., constitute prohibited assignments to or for the benefit of the corporation in violation of

section 2 of the act of March 28, 1908 (35 Stat. 52, 43 U.S.C. sec. 324), and whether Hoodco Farms, Inc., holds in excess of 320 acres in violation of section 7 of the act of March 3, 1891 (26 Stat. 1096, 43 U.S.C. sec. 329), are related and will also be considered jointly.

Section 2 provides that "no assignment \* \* \* shall be allowed or recognized except to an individual \* \* \*; but no assignment to or for the benefit of any corporation or association shall be authorized or recognized." Section 7 provides that "no person or association of persons shall hold by assignment or otherwise prior to the issuance of patent, more than three hundred and twenty acres of such arid or desert lands."

There is no question but that an entryman under the Desert Land Law has the right to mortgage his entry prior to patent to either an individual or a corporation as asserted by contestees (Shearman Brief, p. 51-58; Barnes Brief, p. 26). *Hafemann v. Gross*, 199 U.S. 342 (1905); *Whitney v. Buckman*, 13 Cal. 536 (1859); *Bashore v. Adolf*, 238 Pac. 534 (Idaho 1925); *Worthington v. Typton*, 172 Pac. 1048 (N.M. 1918); *Robert v. Hudson*, 173 Pac. 786 (Wyo. 1918). In fact, the regulations of the Department expressly recognized such right (43 CSR 2226.0-3(a)). There is likewise no question but that an entryman has the right to hire others to perform the work necessary for reclamation of the entries. He is not required to reclaim an entry by his own hand. *In re Henderson*, 21 Hawaii 104 (1912); *Williams v. Kirk*, 38 L.D. 429 (1910). But it does not logically follow that a mortgage to a corporation coupled with a contract to reclaim under a long term lease cannot constitute an assignment or cannot result in a holding by the corporation.

The contestees take the position that the agreements, notes and mortgages between the entrymen and Hoodco Farms constitute a security transaction only and were not, therefore, assignments (Shearman Brief, p. 51-52; Barnes Brief, p. 29). To determine whether an assignment was made one must look to the results of the documents rather than to the labels the parties select for their designation. "The courts look beyond mere names and within to see the real nature of an agreement, and determine from all its provisions taken together, and not from the name that has been given to it by the parties or from some isolated provision, its legal character and effect." *Arbuckle v. Gates*, 95 Va. 802, 30 S.E. 496 (1898). In this case, through the agreements, notes and mortgages, Hoodco Farms acquired:

1. The right to exclusive possession of the entries for a period of 20 years.
2. The right and obligation of reclaiming the land by grading and leveling and constructing an irrigation system.
3. The right to operate the irrigation system.
4. The exclusive right to farm the land and retain the proceeds from the farming operation.

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5. The right to pledge the entries to secure loans.

The question then is whether the transfer of these rights and obligations to the corporation constitutes an assignment and results in a holding within the meaning of the statute.

The parties agree that the words "assignment" and "hold" have no precise meaning but must be construed in the context in which they are used (Shearman Brief, p. 61; Gov't Reply Brief, p. 65). The contestees argue that the statute intends to prohibit the acquisition by a corporation of title to the land and that a transfer of anything less than the whole interest in the entry would not constitute an assignment or result in a holding by the corporation. But, in legal usage, "assignment" is used in some contexts to designate a transfer of the entire estate in land, in others, to refer to the transfer of only a partial interest. "Hold" is variously used with similar dual or multiple connotations. But reading sections 2 and 7 of the Desert Land Law together and particularly in the light of other provisions (section 5, for example, providing that the person so entering shall expend the \$3 per acre in reclaiming), it appears that Congress intended to prevent a consolidation of entries and to exclude corporations from control and reclamation of the entries. The words in section 7, "no person or association of persons shall hold by assignment or otherwise" clearly indicate a prohibition against a holding by any means whatsoever. Consequently, the words "assignment" and "hold" should be given a construction that will make the apparent purpose of the act effective.

*United States v. Trinidad Coal and Coking Company*, 137 U.S. 160 (1890), was an action under the Coal Lands Act to cancel patents allegedly issued on fraudulent misrepresentation. The act provided that no association of persons could hold more than 320 acres of coal land. The officers and employees of the defendant corporation entered separate tracts of coal lands which were subsequently used by the corporation. In answering an argument that this was permissible under the statute, the Court said (at p. 166-167) :

\* \* \* This contention cannot be sustained unless the court lends its aid to make successful a mere device to evade the statute. The policy adopted for disposing of the vacant coal lands of the United States should not be frustrated in this way. It was for Congress to prescribe the conditions under which individuals and associations of individuals might acquire these lands, and its intention should not be defeated by a narrow construction of the statute. If the scheme described in the bill be upheld as consistent with the statute, it is easy to see that the prohibition upon an association entering more than 320 acres, or entering or holding additional coal lands, where one of its members has taken the benefit of its provisions, would be of no value whatever. \* \* \*

In *United States v. Keitel*, 211 U.S. 370 (1908), the Court, in considering the same question, stated (at p. 390) :

\* \* \* It is a misconception to assume that there is any real identity between a purchase made by a qualified person in his own name and for himself with a purchase made by such person ostensibly for himself but really as the agent of a disqualified person. In the one case the person securing coal land from the United States for himself is free to dispose of the land after acquisition as he may deem best for his interest and for the development of the property acquired. In the other case the ostensible purchaser acquires with no dominion or control over the property, with no power to deal with it free from the control of the disqualified person for whose benefit the purchase was made.

The Court, in these cases, looked to the person receiving the benefit of the entries in determining whether there was a holding of more than 320 acres and whether the result was fraudulent.

Assignment as used in sections 2 and 7 is, therefore, concluded to mean such interest or partial interest as will result in effective control of and benefit from the entry or entries. The acquisition of such interest constitutes a holding within the meaning of the statute. In this case, the right to possess, reclaim, farm, retain the farming proceeds and pledge the entries, gave Hoodco Farms complete dominion over the entries for a period of 20 years and constituted a prohibited assignment and holding in excess of 320 acres of desert land.

### *XI. Expenditure on the Entries*

The next issue presented is whether each entryman has failed to expend the amount required by law necessary for irrigation, reclamation, and cultivation of the lands as required by section 5 of the act of March 3, 1891. This section provides:

No land shall be patented to any person \* \* \* unless he or his assignors shall have expended in the necessary irrigation, reclamation, and cultivation \* \* \* thereof, \* \* \* at least \$3 per acre.

The entrymen, with the exception of Reed and Michener, did not spend \$3 per acre of their own funds, pledge their personal credit, or become personally involved in the reclamation of their desert land entries. Hoodco Farms supplied all of the money expended to meet the \$3 per acre expenditure requirement. The Government takes the position that the entryman has to become personally involved in the expenditure requirement in order to meet the provisions of the statute (Gov't Brief, p. 119-121). The contestees contend that the source of funds is immaterial (Shearman Brief, p. 63-69). Both turn to the legislative history, finding support in the House Report No. 1888, 49th Cong. 2d Sess. 2 (1886), which reads:

The tide of emigration which flows in increasing volume upon this desert territory demands that the law be so framed and administered that titles may be acquired by those who in good faith brave the hardship of the frontier and by expenditure of time and labor successfully reclaim the desert waste.

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\* \* \* [B]y amendment to the existing law, the Committee has sought to cure the existing mischief of the present law and advance the interests of the public and the settler.

\* \* \* \* \*  
Time and experience will doubtless suggest still further improvement, but the amendments now proposed, if enacted into law and properly administered, will prevent holding of land thereunder without reclamation and for mere speculation. Failure to annually spend the required sum in reclamation when met by prompt loss of the land and forfeiture of moneys paid will afford no opportunity for the abuses which now exist, but will render it certain that in the large majority of cases the object of the law will be promptly and successfully accomplished. [H.R. Rep. No. 188, 49th Cong., 1st Sess. 2-3 (1886)].

The Government concludes that the foregoing indicates that "personal involvement in the reclamation of the land was intended and assumed by Congress;" the contestees that "the intent of the amendment was to deal not with the *source* of funds, but rather to insure that reclamation did in fact take place."

It is not necessary to attempt to read the intent of Congress from the legislative history. "The meaning of [the] words considered alone is clear." *United States v. Hammers*, 221 U.S. 220 (1911). "No land shall be patented to any person unless *he or his assignors shall have expended* \* \* \* \$3 per acre." Other sections of the Desert Land Law reiterate the congressional intent. Section 5 of the act of March 4, 1915 (38 Stat. 1161, 43 U.S.C., sec. 335) allows an extension of time within which proof may be filed if "\* \* \* the entryman \* \* \* has, in good faith, complied with the requirements of the law as to yearly expenditures and proof thereof." The Act of February 25, 1925, 43 Stat. 982, 43 U.S.C., sec. 336, allows a further extension if "\* \* \* the entryman \* \* \* has in good faith complied with the requirements of the law as yearly expenditure and proof thereof \* \* \*." In passing the Desert Land Law, Congress looked to the entryman for expenditures and proof.

The requirement for personal expenditure of funds was dealt with *In re Henderson*, 21 Hawaii 104 (4th Cir. 1912). The Court said (at p. 117-118):

\* \* \* It has been argued that the clause in question does not provide that the cultivation shall be done by the freeholder, and that as the land was under cultivation at the time the appellee acquired it, the condition was at once fulfilled. Although the clause does not expressly so state, it must be construed to mean that the cultivation is to be performed by the freeholder. We do not mean by this that it is necessarily to be done by the freeholder with his own hands, but that it must be done by him or by his servants or agents for him. The crops grown must be his crops and not those of another. A different construction would not accord with the spirit and intent of those portions of the Land Act of 1895

(R.L. Chap. 22) relating to the homesteading of public lands of which the provisions relating to "cash freeholds" are a part. The general purpose and intent of those portions of the statute may be briefly stated to be the settlement and occupation of agricultural and pastoral lands by citizen farmers, and the encouragement of the diversification of local industries, for the social, political and material benefit of the country. \* \* \* To this end \* \* \* he is expected and required to cultivate the land for it is for that very purpose that he is supposed to have applied for it. It is with that object in view that the government offers such lands to settlers at less than their full value and requires them to make oath that they apply for the land solely for their own use and benefit.

In *Salina Stock Co. v. United States*, 85 F. 339 (8th Cir., 1898), the Government brought an action to vacate two desert land patents granted to Edward A. Franks and Nellie Franks. The facts are analogous to those present in the current proceeding. The Court, in sustaining the action, stated (at p. 341) :

The Franks resided in the city of Salt Lake, Utah more than 100 miles from this land. They were people of very limited means. One Samuel H. Gilson, who was connected with this stock company, and perhaps its vice president \* \* \* suggested to Edward A. Franks the idea of locating this land. He \* \* \* induced Mrs. Franks to enter into this scheme. Neither of the Franks had ever seen the lands at the time of their application, and from that day to the making of the final proofs they were never on the land. When the time arrived for making the final proofs they were taken to the lands by one Feron, who was the surveyor for the Salina Stock Company. On arrival at the lands they met Mr. Ireland, who was one of the promoters of the defendant company, its manager, and later its treasurer. They were hauled about over the land, and shown some irrigating ditches, into which some water was turned for exhibition, to enable the Franks, without much strain of conscience, to swear that they had seen water running in the ditches. The land was then fenced and in the control of Ireland, and the ditches, whatever were there, had been made without the knowledge of the Franks, and without any expense to them. The evidence does not show that they had ever obtained any water rights, by grant or otherwise. They were on the land but a few hours. They were then taken back to Salt Lake City, where they made the required affidavits for final entry, swearing to everything according to the form of the depositions requisite to perfect the entry. When they left the lands said Ireland gave Edward Franks a letter to one Chambers, directing Chambers to pay Franks. The sum so received by Franks amounted to about \$215, which covered his and Mrs. Franks' expenses in going to and from the land, and presumably to compensate them for the use of their names and their trouble. Taking the whole testimony together, there can be no doubt that the Franks never paid one dollar of the money on the entry of this land. Afterwards they made to the company quitclaim deeds to the lands, with a nominal consideration expressed therein.

The decisions in the *Henderson* and *Salina Stock Co.*, cases, *supra*, disclose the Court's concern with the entryman's failure to expend funds or make a personal contribution to the reclamation of the land.

The contestees cite *Conway v. United States*, 95 F. 615 (8th Cir., 1899) and the Departmental decision in *Williams v. Kirk*, 38 L.D. 429 (1910), as establishing the immateriality of the source of funds in reclaiming desert land.

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*Conway v. United States* is an action brought by the United States to recover the value of timber alleged to have been wrongfully cut from an entry under the Homestead Law. The entryman entered into a contract with Conway to clear and cultivate the land in the entry, construct a frame dwelling and other buildings in exchange for the timber. The Court concluded that the homestead entryman contracted in good faith to have the entry cleared of timber for purpose of preparing the land for cultivation. The Court concluded (p. 619) that "the question is one of good faith on the part of the settler." The decision in this case is, therefore, distinguishable. The action taken by the homestead entryman in the *Conway* case was for the purpose of settlement and cultivation of the land by the entryman as opposed to reclamation for the benefit of a corporation. The entryman was personally involved in the expenditure for reclamation. He traded a valuable asset he acquired with his entry, the timber, for the work required in effecting reclamation.

In the *Williams* decision, a contest between Kirk and Williams, a competing claimant, the Department held (at p. 435):

\* \* \* It is objected by contestants that Mrs. Kirk put no improvements on the land and that whatever may have been paid on the water right was not paid from her own funds, but by her brother McCune, if paid in fact.

If this were true, so only the required sum was paid for her, with view to her entry, in a way and for a purpose honestly intended to effect reclamation of her land, the requirement of law is satisfied. The object of the law is to effect reclamation of arid land and make it productive. One may properly aid his kindred or even a friend or person to whom his benevolence, affinity, duty, benignity, or confidence in a promise to repay, moves him, so long as he does not seek indirectly in this way to obtain title. Of these necessary requisites there is no room to doubt. The water company has expended more than three dollars per acre for all the entries within its projected lines, it has credited the necessary sum as paid by or for Mrs. Kirk, the works undertaken were obviously undertaken and money expended in a way and for a purpose honestly intended to effect reclamation of Mrs. Kirk's land, as well as other in that vicinity. In *Bedford v. Clay*, affirmed by the Department (unreported), your office held that:

"This office can not seek the source of money expended for purposes of reclamation or determine private interests under indefinite contracts with reference to such work. These are matters for local courts. Sufficient it is if an entryman causes, in good faith, expenditure of the required amount in permanent improvements for the purpose of reclaiming the entered land."

This is the rule applicable. \* \* \*

The contestees do not come within the rule. The Department "cannot seek the source of money expended for the purpose of reclamation" "if an entryman causes, *in good faith*, expenditure of the required amount in permanent improvements for the purpose of reclaiming and entering the land." The evidence in this case discloses that the



entrymen did not act in good faith and that Hoodco Farms, not the entrymen, caused the expenditure to be made for the reclamation.

The *Williams* decision makes clear that it was not intended to give effect to any illegal contract or understanding by the entryman in the concluding instructions to the Commissioner of the General Land Office (at p. 438):

The conclusion here reached merely disposes of the contest and is not intended to give effect to any illegal contract or understanding, either through the agreements hereinbefore referred to or to any private understanding aside from or under them. In passing upon proofs which have been or may be offered on these entries you will be free to make such investigation as is necessary respecting such matters, so that it may be satisfactorily shown that the law has been fully complied with and in no respect evaded or violated.

Except for Reed and Michener, the entrymen did not expend \$3 per acre in the reclamation of their entries and, with the exception of Reed, Michener and Shearman, their only contribution to the reclamation was affixing their signature to documents which resulted in no personal liability.

### *XII. The Secretary's Right to Act*

The next issues are whether the entrymen are, as a matter of law, entitled to their entries and whether the Government is, by the stipulation and the record upon which the Director's decision of August 14, 1964, was based, restricted to that record.

As previously stated, the prior proceedings and the Director's decision were based upon a stipulation which provided that "the matters in dispute as set forth in a complaint and answer filed herein with respect to the desert entries in question may be determined upon the record and the evidence set forth in the stipulation." The Secretary, upon recommendation of the Solicitor, thereafter set aside the Director's decision, ordered a rehearing of the matter and a recommended decision by the Hearing Examiner. The contestees assert:

1. The Administrative Procedure Act and the regulations of the Department of the Interior preclude further actions by the Department (Shearman Brief, p. 73).
2. The Government is estopped to deny the validity of the decision and order of August 14, 1964 (Shearman Brief, p. 75).
3. The issues are *res judicata* (Shearman Brief, p. 77).
4. Due process of law demands that the entrymen receive and retain their patents (Shearman Brief, p. 83).
5. The Government is bound by the stipulation and the record in the previous proceeding (Shearman Brief, p. 71).

Section 3 of the Administrative Procedure Act (43 U.S.C. 1002) to which this proceeding is subject (*Adams v. Witmer*, 271 F. 2d 29, CA DC 9 (1959); *United States v. O'Leary*, 63 I.D. 341 (1956)) states:

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\* \* \* Every agency shall separately state and currently publish in the Federal Register \* \* \* statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures [and] \* \* \* substitutive rules adopted as authorized by law \* \* \*. No person shall in any manner be required to resort to organization or procedure not so published.

Contrary to the contestees' assertion, the Secretary has, in compliance with this provision of the Administrative Procedure Act, reserved by regulation the right to consider and correct decisions of the Director which have become final. Title 43 CFR 1843.9 provides:

When any party fails to appeal to the Secretary from an adverse decision of the Director, that decision shall as to such party be final and will not be disturbed *except for fraud or for gross irregularity*. (Italics added.)

The Secretary acted pursuant to this regulation in ordering a hearing and a decision upon the advice of the Solicitor that a question of fraud or gross irregularity was involved. (Memorandum of the Solicitor, 72 I.D. 157 (1965)). There is, therefore, regulatory provision for the action here taken.

The question then is whether administrative proceedings of the Department of the Interior involving public lands are, as a matter of law, subject to estoppel and *res judicata* so as to preclude modification or reversal by the Secretary of a final decision of the Director. The doctrines of estoppel and *res judicata* are not universally applicable to administrative agencies. In *National Rifle Association of America v. Young et al.*, 134 F. 2d 524 (CA DC 1943), the Court stated that the question presented to the Court was whether the District Unemployment Compensation Board, after a hearing on a claim for tax exemption and a ruling that the appellant was entitled to an exemption, was thereafter precluded from changing its decision on the ground of estoppel and *res judicata*.

Though the doctrine of *res judicata* has been applied to administrative action of some sorts, it is clear that this judicial doctrine is not to be imported into all administrative proceedings. Administrative agencies are not bound by "the conventional judicial modes for adjusting conflicting claims," and "an administrative determination in which is embedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge."<sup>5</sup>

The Superior Court was dealing in the case quoted with an administrative error which had been corrected by the court, but the principle is broader than the instance. What errors administrative agencies themselves may correct depends ultimately upon the balance of conflicting considerations. It is always desirable that controversies be settled quickly and finally, but it is also desirable that they be settled correctly. [p. 526]

<sup>5</sup> *Federal Communications Commission v. Pottsville Broadcasting Company*, 309 U.S. 134, 142, 145 (1940), 60 S. Ct. 437, 84 L. Ed. 656.

The authority of the Secretary to modify or change previous decisions has long been recognized by the courts. In an early case, *Knight v. U.S. Land Association*, 142 U.S. 161 (1891), a decision had been made by the Commissioner of the General Land Office from which no appeal had been taken. The Secretary of the Interior nevertheless sent for the case and after review reversed the Commissioner. The Supreme Court, answering an argument that the Secretary had no authority to so act, stated (at p. 181) :

It make no difference whether the appeal is in regular form according to the established rules of the Department, or whether the Secretary on his own motion, knowing that injustice is about to be done by some action of the Commissioner, takes up the case and disposes of it in accordance with law and justice. The Secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it. He represents the government, which is a party in interest in every case involving the surveying and disposal of the public lands.

This same principle was reaffirmed in a later decision by the Supreme Court in *West v. Standard Oil Company*, 278 U.S. 200 (1929). This was an action brought by Standard Oil to enjoin the continuation of administrative proceedings in the local land office. The question involved was whether a particular area in California was known to be mineral in character in 1903, the date of approval of a survey by the Department. If the land was not then known to be mineral in character, title to the land passed to the State of California under an act of Congress and through California to Standard Oil. The Department of the Interior had initiated an administrative proceeding to determine the question in 1921. The Secretary of the Interior ordered the proceedings dismissed. A successor Secretary had reinstated the proceedings and had been enjoined from proceeding by the lower Court. In reversing the decision below, Justice Brandeis stated for the Court (at p. 210) :

If at the time of Secretary Work's order the Department still had jurisdiction of the land, he possessed the power to review the action of his predecessor and to deal with the matter as freely as he could have done if the dismissal of the proceedings had been his own act or that of a subordinate official. For, so long as the Department retains jurisdiction of the land, administrative orders concerning it are subject to revision. *New Orleans v. Paine*, 147 U.S. 261, 37 L. ed. 162, 13 Sup. Ct. Rep. 303; *Beley v. Naphtaly*, 169 U.S. 353, 364, 42 L. ed. 775, 779, 18 Sup. Ct. Rep. 354; *Lane v. Darlington*, 249 U.S. 331, 63 L. ed. 629, 39 Sup. Ct. Rep. 299; *Parcher v. Gillen*, 26 Land Dec. 34; *Aspen Consol. Min. Co. v. Williams*, 27 Land Dec. 1. Compare *Louisiana v. Garfield*, 211 U.S. 70, 75, 53 L. ed. 92, 96, 29 Sup. Ct. Rep. 31.

Other cases to the same effect were cited in *State of Wisconsin et al.*, 65 I.D. 265 (1958).

As the Court stated in *West v. Standard Oil Company*, *supra*, the Secretary may reconsider and revise decisions so long as he retains jurisdiction of the land. The Secretary may not reconsider a matter

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previously decided when title or a right in the land has vested in a claimant under the public land laws either as a result of the issuance of patent (*Iron Silver Min. Co. v. Campbell*, 135 U.S. 286 (1890)), by operation of law (*West v. Standard Oil Company, supra*), or by grant of a license, easement, or right-of-way (*Chapman v. El Paso Natural Gas Company*, 204 F.2d 46) (C.A. D.C. 1953)).

In *Chapman v. El Paso Natural Gas Company, supra*, the Court denied the Secretary the right to reopen the proceeding for the purpose of imposing additional requirements on the gas company after granting a license to construct a pipeline across public land. However, the Court concluded by saying (at p. 53).

It may well be appropriate for a licensing authority to reopen proceedings of this kind after final determination has been made in order to correct clerical errors or to modify rulings on the basis of newly discovered or supervening facts, but a decision may not be repudiated for the sole purpose of applying some quirk or change in administrative policy, particularly where, as here, considerable funds have been expended in justifiable reliance upon the earlier ruling. \* \* \*

The Court here recognized the Secretary's general authority to reopen proceedings, but refused to condone a reopening "for the sole purpose of applying some quirk or change in administrative policy" after a license or authorization had been granted.

The cases cited by the contestees do not hold otherwise. Those cases involved either a denial by the Courts of authority to the Secretary to reconsider a decision after a right in land has vested in a claimant or the application of the doctrine of *res judicata* by the Department in administrative cases in which issues had been previously determined by a final administrative decision. None of the cited cases involve questions of fraud or gross irregularity. Furthermore, refusal by the Secretary to reconsider, at the request of litigious applicants, issues which have gone to final administrative decision does not provide a basis for concluding that the Secretary lacks authority to reopen or reconsider cases on his own initiative.

Even after rights in public lands have vested in third parties, the Government is not precluded from challenging and having the Secretary's actions rescinded if fraud or even a mistake is involved. (*United States v. Southern Pacific Company*, 251 U.S. 1 (1919); *Causey v. United States*, 240 U.S. 399 (1916); *Booth-Kelly Lumber Co. v. United States*, 237 U.S. 481 (1915); *Krueger v. United States*, 246 U.S. 69 (1918); *Germania Iron Co. v. United States*, 165 U.S. 379 (1897).) If the Secretary has lost administrative jurisdiction, he is required to pursue a remedy in the Federal Court. Except for those entrymen to whom patent has been issued, legal title has not vested and the Secretary has not lost administrative jurisdiction.

The contestees assert a denial of due process. The question of due process was considered in *Orchard v. Alexander*, 157 U.S. 372 (1895). In that case the rule was stated (at p. 383):

Of course, this power of reviewing and setting aside the action of the local land officers is as was decided in *Cornelius v. Kessel*, 128 U.S. 456, not arbitrary and unlimited. It does not prevent judicial inquiry. *Johnson v. Towsley*, 13 Wall. 72. The party who makes proofs, which are accepted by the local land officers, and pays his money for the land, has acquired an interest of which he cannot be arbitrarily dispossessed \* \* \*. The government holds the legal title in trust for him, and he may not be dispossessed of his equitable rights without due process of law. Due process in such case implies notice and a hearing. But this does not require that the hearing must be in the courts, or forbid an inquiry and determination in the Land Department.

In the present case, the contestees have been given notice and have participated in a hearing as required by the *Orchard* decision.

The contestees make the further contention that the Secretary is bound by the stipulation entered into in the prior proceeding. If the Secretary has authority to act *sua sponte*, he cannot be divested of this power by the acts of a subordinate. "The United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit." (*Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917).) To hold otherwise would lead to an absurd result. The Secretary would be required to issue a patent when, convinced on the basis of the record before him, such action was improper, and then move to have the patent invalidated by the Federal Court. As was stated in *Knight v. United Land Association*, *supra* (at p. 178):

\* \* \* For example, if, when a patent is about to issue, the Secretary should discover a fatal defect in the proceedings, or that by reason of some newly ascertained fact the patent, if issued, would have to be annulled, and that it would be his duty to ask the Attorney General to institute proceedings for its annulment, it would hardly be seriously contended that the Secretary might not interfere and prevent the execution of the patent. He could not be obliged to sit quietly and allow a proceeding to be consummated which it would be immediately his duty to ask the Attorney General to take measures to annul. It would not be a sufficient answer against the exercise of his power that no appeal had been taken to him and therefore he was without authority in the matter.

#### *Final Conclusion*

Title 43 U.S.C. sec. 329 provides that "claims or entries \* \* \* shall be subject to contest \* \* \* for \* \* \* failure to comply with the requirements of law and upon satisfactory proof thereof shall be canceled, and the lands, and moneys paid therefor, shall be forfeited to the United States." Since, in this case, there has been a failure to comply with the requirements of law, the entries must be canceled.

DENT D. DALBY,  
*Chief Hearing Examiner.*

## INDEX-DIGEST

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2. Where the Government contends that the terms of the contract for a digital dispatching system require a contractor to furnish not only the computer program essential for its operation in calculating transmission system losses, but also additional computer programs that would be required under varying conditions resulting from contemplated future changes or additions to the system and where the contractual provisions relied upon by the Government are found to be ambiguous from several standpoints, the rule of *contra proferentem* will be followed and the ambiguous contract provisions will be construed against the Government as the drafter.....
3. Where in construing a contract for a digital dispatching system the contractor's interpretation excludes any obligation on its part to furnish a single set of B-constants for calculating transmission system losses, but concedes that it is required to furnish as a part of the system an economic dispatch program including water optimization and transmission losses and that one set of B-constants is essential for an accurate consideration of transmission losses, and hence it appears that one set of B-constants must be furnished in order to complete the system, the contractor's interpretation of the contract requirement is unreasonable, precluding the doctrine of *contra proferentem*, notwithstanding the contractor's unsupported assertion that a trade practice and precedents substantiate its interpretation.....
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**Contracting Officer**

1. Where, under a standard form of construction contract the contractor's right to proceed with the performance thereof is terminated for unsatisfactory progress and where it appears that the principal causes of the delay were the acts of the representative of the contracting officer, who willfully and arbitrarily interfered with and assumed control of the work under the contract, such causes are excusable and the contract will be deemed to have been terminated for the convenience of the Government.----- 63

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1. Under a contract requiring the performance of grouting work on a dam foundation, where the quantities of grout to be placed could not be accurately estimated in advance of bidding and where a changed condition was found to exist which was manifested by the acceptance in deeper pervious formations of excessive quantities of grout, the allowable costs resulting from continuous grouting required on the project will include only such costs as are in excess of the expenses that should have been anticipated taking into account contract provisions calling for continuous grouting and other relevant factors.----- 196
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## Intent of Parties

1. Liquidated damages were assessed under contract clauses which established a completion date for an intermediate stage of survey work plus a liquidated damages provision applicable to the intermediate stage. A separate liquidated damages schedule was applicable to a completion date established for one of the contract's final stages, that completion date originally falling 135 days later than the date fixed for the intermediate stage. In circumstances where the original 135-day period had been substantially lengthened due to the issuance of time extensions of unequal length for the two stages, it was found that there was not a sufficient showing that actual damages would be suffered by the Government beyond the originally established 135-day period to justify enforcement of the liquidated damages clause applicable to the intermediate stage clause for more than that period; therefore, the Board enforced the liquidated damages provision only for 135 days as a reasonable measure of the loss to the Government resulting from nonavailability of the intermediate work.....

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1. The provision in the standard Changes clause requiring a contractor to assert a claim for adjustment within 30 days after receipt of a written change order is not applicable where the change was staking of the work by the Government that varied substantially from a contract drawing, accompanied by oral instructions that were never reduced to writing.-----

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1. A contractor's claim based upon the fact that the Government's staking for a conveyance channel did not follow a contract drawing for "typical section in cut" excavation work was denied in so far as it concerned losses assertedly sustained in the claimant's own operations as a prime contractor, since the contractor's failure to make a timely protest to the contracting officer was found, upon review by the Board, to be seriously prejudicial to the interests of the Government.-----
2. The board, in reviewing the question of whether the failure to make a timely protest to the contracting officer is prejudicial to the interests of the Government, will review all of the circumstances, and will consider a claim for equitable adjustment on its merits in a situation where it would be unreasonable and inequitable to refuse to waive a protest requirement because of commitments for special equipment made by a subcontractor in reliance upon a contract drawing which the Government did not follow in staking the project.-----

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**Subcontractors and Suppliers**

1. The contracting officer's determination on a contractor's entitlement to a time extension, by reason of alleged excusable causes of delay, will be sustained where the contractor fails to show that such determination is erroneous by a preponderance of the evidence and where it appears that the unexcused delays were attributable to manufacturing difficulties of a subcontractor or to a failure of the subcontractor's quality control.-----
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diminished by the fact that entire work covered thereby has been subcontracted; consequently, the absence of such qualifications is not an excusable cause of delay under the standard form of supply contract.....

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**Waiver and Estoppel**

1. A contractor who bids on a Government contract unqualifiedly represents that it has the supervision, personnel, equipment, skill and ability to do the work and its responsibility is in nowise diminished by the fact that entire work covered thereby has been subcontracted; consequently, the absence of such qualifications is not an excusable cause of delay under the standard form of supply contract.....
2. The Board, in reviewing the question of whether the failure to make a timely protest to the contracting officer is prejudicial to the interests of the Government, will review all of the circumstances, and will consider a claim for equitable adjustment on its merits in a situation where it would be unreasonable and inequitable to refuse to waive a protest requirement because of commitments for special equipment made by a subcontractor in reliance upon a contract drawing which the Government did not follow in staking the project.....

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**Warranties**

1. The Government's claim of an implied warranty of fitness for a particular purpose will not be recognized where the only indications of notice to the contractor of the particular purpose for which the system ordered under the contract is required, insofar as the matter in controversy is concerned, are the ambiguous provisions of an invitation for bids which are reasonably susceptible of the contrary interpretation placed upon them by the contractor, particularly when viewed in the light of the conduct of the parties both prior and subsequent to the award of contract.....

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**DISPUTES AND REMEDIES****Burden of Proof**

1. The contracting officer's determination on a contractor's entitlement to a time extension, by reason of alleged excusable causes of delay, will be sustained where the contractor fails to show that such determination is erroneous by a preponderance of the evidence and where it appears that the unexcused delays were attributable to manufacturing difficulties of a subcontractor or to a failure of the subcontractor's quality control.....
2. Under a contract for the performance of survey work the contracting officer properly terminated the contract for default where the weight of the evidence supported a conclusion that following the receipt of letters warning the contractor to comply with the performance schedule, the contractor abandoned the work after a series of delays, due in part to Government error but caused principally by inadequate performance and financial difficulties..

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**CONTRACTS—Continued**

**DISPUTES AND REMEDIES—Continued**

**Burden of Proof—Continued**

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3. Following a termination for default the Government failed to sustain its burden of proof as to mitigation of damages and reasonableness of the assessment of excess costs, where because of urgent requirements the work of completion was divided and performed by the Government and two other contractors simultaneously, instead of by the presumably less costly method of completion by the two next low bidders on the original procurement..... 378

**DAMAGES**

**Actual Damages**

1. Liquidated damages provisions in contracts are valid and enforceable if, judged at the time of contract, they bear a reasonable relationship to the damages which could be expected to flow from delayed performance, and where the amount of possible actual damages would be difficult or impossible of ascertainment in advance, notwithstanding the fact that the actual damages sustained by the Government are uncertain in amount and even though the liquidated damages assessed may have constituted a hardship to the contractor because the amount thereof represented a high proportion of the contract price..... 15
2. Liquidated damages provisions in contracts are valid and enforceable if, judged as of the time the contract was entered into, they bear a reasonable relationship to the damage which could be expected to flow from delayed performance, and the amount of possible actual damages would be difficult or impossible of ascertainment in advance, even though as it turned out the actual damages sustained by the Government are uncertain in amount and appear to be minimal..... 140

**Liquidated Damages**

1. A contractor's request that the liquidated damages assessed for an unexcused delay be substantially reduced was denied, where it was found that contract language clearly authorized the assessment made and where, consequently, the Board was without jurisdiction in the matter, irrespective of whether the request were to be viewed as asking reformation of the contract or seeking remission of liquidated damages..... 15
2. Liquidated damages provisions in contracts are valid and enforceable if, judged at the time of contract, they bear a reasonable relationship to the damages which could be expected to flow from delayed performance, and where the amount of possible actual damages would be difficult or impossible of ascertainment in advance, notwithstanding the fact that the actual damages sustained by the Government are uncertain in amount and even though the liquidated damages assessed may have constituted a hardship to the contractor because the amount thereof represented a high proportion of the contract price..... 15
3. Liquidated damages provisions in contracts are valid and enforceable if, judged as of the time the contract was entered into, they bear a reasonable relationship to the damage which could be expected

**CONTRACTS—Continued****DISPUTES AND REMEDIES—Continued****DAMAGES—Continued****Liquidated Damages—Continued**

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to flow from delayed performance, and the amount of possible actual damages would be difficult or impossible of ascertainment in advance, even though as it turned out the actual damages sustained by the Government are uncertain in amount and appear to be minimal.-----

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4. Liquidated damages were assessed under contract clauses which established a completion date for an intermediate stage of survey work plus a liquidated damages provision applicable to the intermediate stage. A separate liquidated damages schedule was applicable to a completion date established for one of the contract's final stages, that completion date originally falling 135 days later than the date fixed for the intermediate stage. In circumstances where the original 135-day period had been substantially lengthened due to the issuance of time extensions of unequal length for the two stages, it was found that there was not a sufficient showing that actual damages would be suffered by the Government beyond the originally established 135-day period to justify enforcement of the liquidated damages clause applicable to the intermediate stage clause for more than that period; therefore, the Board enforced the liquidated damages provision only for 135 days as a reasonable measure of the loss to the Government resulting from nonavailability of the intermediate work.-----

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**Measurement**

1. The Board of Contract Appeals has inherent authority to arrive at an equitable adjustment by means of an approximation, where the total cost of performance has been established by a preponderance of the evidence and it is not possible to calculate the adjustment with mathematical precision.-----

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**Equitable Adjustments**

1. The Board, in reviewing the question of whether the failure to make a timely protest to the contracting officer is prejudicial to the interests of the Government, will review all of the circumstances, and will consider a claim for equitable adjustment on its merits in a situation where it would be unreasonable and inequitable to refuse to waive a protest requirement because of commitments for special equipment made by a subcontractor in reliance upon a contract drawing which the Government did not follow in staking the project.-----
2. The Board of Contract Appeals has inherent authority to arrive at an equitable adjustment by means of an approximation, where the total cost of performance has been established by a preponderance of the evidence and it is not possible to calculate the adjustment with mathematical precision.-----
3. Under a contract escalation clause providing for partial reimbursement to the contractor in the event of increases in wage rates, exclusive of subsistence payments, where new schedules of compensation paid by the contractor are based upon union agreements providing for successively higher increments of pay depend-

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**CONTRACTS—Continued****DISPUTES AND REMEDIES—Continued****Equitable Adjustments—Continued**

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ent upon the increasing degree of remoteness of the work site from the union office, and discontinuing previous arrangements for payments of sums designated as subsistence, the new compensation schedules are deemed to contain a measure of subsistence payments, but are determined also to require an equitable adjustment for amounts that are eligible for reimbursement under the escalation provisions of the contract-----	86
4. An equitable adjustment for the costs of installing and removing a steel sheet piling cofferdam and related work will be allowed under the "first category" of the Changed Conditions clause, where plans for a pumping plant prepared for the Government by a large engineering firm of widely recognized competence included a clear indication that the sides of an excavation would stand on a steep slope, and the contractor in justifiable reliance upon that indication originally proceeded to excavate without use of a cofferdam, the contractor having no duty in the circumstances to make its own borings or to engage in other extensive and costly pre-bid checking of subsurface conditions-----	131
5. Where changed conditions are encountered that not only necessitate additional work which is covered by unit prices, but also cause a delay in the commencement of a succeeding stage of the work, costs incurred in the performance of the succeeding stage and claimed to have resulted from such delay (wage differential and overtime bonus payments and the expense of moving equipment) are not directly related to the changed conditions and may not be included in an equitable adjustment-----	196
6. Under a contract requiring the performance of grouting work on a dam foundation, where the quantities of grout to be placed could not be accurately estimated in advance of bidding and where a changed condition was found to exist which was manifested by the acceptance in deeper pervious formations of excessive quantities of grout, the allowable costs resulting from continuous grouting required on the project will include only such costs as are in excess of the expenses that should have been anticipated taking into account contract provisions calling for continuous grouting and other relevant factors-----	196
7. The equitable adjustment contemplated by the Changed Conditions clause incorporated in Standard Form 23A (April 1961 edition) encompasses not only the added costs of overcoming the changed condition itself within the strict physical limits of that condition but includes as well the expense of extra work caused by the changed condition in areas immediately adjacent thereto-----	229
8. Where the area over which survey work is to be performed is changed after award of a contract to a surveying firm, the increased amount to be paid because the new route is rougher and more inaccessible should be determined principally on the basis of the rule of reasonable value; however, this does not prevent consideration of the costs that reasonably could have been incurred on the changed work area by the contractor selected for the job by the Government-----	316

## CONTRACTS—Continued

## DISPUTES AND REMEDIES—Continued

## Jurisdiction

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1. A contractor's request that the liquidated damages assessed for an unexcused delay be substantially reduced was denied, where it was found that contract language clearly authorized the assessment made and where, consequently, the Board was without jurisdiction in the matter, irrespective of whether the request were to be viewed as asking reformation of the contract or seeking remission of liquidated damages.----- 15
2. Where the exceptions to a "Release on Contract" specifically designate particular claims and amounts as being excluded from the effect of the release, a further claim made thereafter, that cannot reasonably be considered to be within the claims enumerated in the exceptions is barred by the release provisions and will be dismissed.----- 196
3. The Board has jurisdiction of a contractor's claim for quantities of cement delivered in excess of the aggregate estimated requirements for cement for the Glen Canyon Dam and Power Plant, irrespective of whether the contract is a requirements contract and without regard to whether the interpretation of the contract involves the determination of questions of fact, mixed questions of law and fact or questions of law only.----- 266
4. A contractor's characterization of a claim for unnecessary accelerated construction costs of a cement producing plant as a claim for breach of contract will not preclude the Board from scheduling a hearing on the claim where the contracting officer expressly states that the contractor must be relying upon some order from him to accelerate construction and more facts are required for resolution of the jurisdictional question presented.----- 266
5. Under a contract for the delivery of cement for the Glen Canyon Dam and Power Plant, a contractor's claim for loss of commercial business or lost profits, attributed to the Government's failure to order cement in accordance with the estimated requirements set forth in the contract, will be dismissed as without the jurisdiction of the Board where neither the extras clause nor any other contract clause provides a remedy for the alleged wrong.----- 266
6. A construction contractor disputed a contracting officer's requirement that "Line Construction" classifications and pay scales be applied to workmen who assembled and erected steel transmission line towers, contending that it would be proper to utilize "Ironworker, structural" classifications and pay scales (workers in the latter classifications received lower rates of pay). Minimum wage rates for both classification types were incorporated in the contract under the Davis-Bacon Act. The Department of Labor upheld the contracting officer's ruling after considering the matter on two occasions and holding a hearing as part of its second review; in addition, the contractor asked for, and received, consideration (and reconsideration) of the dispute by the Comptroller General of the United States. The Comptroller General also concluded that the contracting officer's classification action was correct. In such circumstances, the Board declined to exercise jurisdiction over an appeal involving the same matter, referred to it under the "Disputes" clause of the contract, and entered an order of dismissal.----- 363

**CONTRACTS—Continued**

**DISPUTES AND REMEDIES—Continued**

**Substantial Evidence**

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1. When an appellant has submitted evidence of a substantial nature tending to establish that rock, within the meaning of the specifications, was encountered and removed, and the Government offers little, if any, counter proof the contention of the appellant must be accepted.....

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**Termination for Default**

1. Where, under a standard form of construction contract the contractor's right to proceed with the performance thereof is terminated for unsatisfactory progress and where it appears that the principal causes of the delay were the acts of the representative of the contracting officer, who willfully and arbitrarily interfered with and assumed control of the work under the contract, such causes are excusable and the contract will be deemed to have been terminated for the convenience of the Government.....
2. Under a contract for the performance of survey work the contracting officer properly terminated the contract for default where the weight of the evidence supported a conclusion that following the receipt of letters warning the contractor to comply with the performance schedule, the contractor abandoned the work after a series of delays, due in part to Government error but caused principally by inadequate performance and financial difficulties.....
3. Following a termination for default the Government failed to sustain its burden of proof as to mitigation of damages and reasonableness of the assessment of excess costs, where because of urgent requirements the work of completion was divided and performed by the Government and two other contractors simultaneously, instead of by the presumably less costly method of completion by the two next low bidders on the original procurement.....

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**FORMATION AND VALIDITY**

**Implied and Constructive Contracts**

1. The provision in the standard Changes clause requiring a contractor to assert a claim for adjustment within 30 days after receipt of a written change order is not applicable where the change was staking of the work by the Government that varied substantially from a contract drawing, accompanied by oral instructions that were never reduced to writing.....

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**PERFORMANCE OR DEFAULT**

**Generally**

1. Liquidated damages provisions in contracts are valid and enforceable if, judged at the time of contract, they bear a reasonable relationship to the damages which could be expected to flow from delayed performance, and where the amount of possible actual damages would be difficult or impossible of ascertainment in advance, notwithstanding the fact that the actual damages sustained by the Government are uncertain in amount and even though the



**CONTRACTS—Continued****PERFORMANCE OR DEFAULT—Continued****Generally—Continued**

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| liquidated damages assessed may have constituted a hardship to the contractor because the amount thereof represented a high proportion of the contract price-----  | 15  |
| 2. Liquidated damages provisions in contracts are valid and enforceable if, judged as of the time the contract was entered into, they bear a reasonable relationship to the damage which could be expected to flow from delayed performance, and the amount of possible actual damages would be difficult or impossible of ascertainment in advance, even though as it turned out the actual damages sustained by the Government are uncertain in amount and appear to be minimal----- | 140 |

**Acceleration**

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|---|-----|
| 1. A contractor's characterization of a claim for unnecessary accelerated construction costs of a cement producing plant as a claim for breach of contract will not preclude the Board from scheduling a hearing on the claim where the contracting officer expressly states that the contractor must be relying upon some order from him to accelerate construction and more facts are required for resolution of the jurisdictional question presented----- | 266 |
|---|-----|

**Breach**

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|---|-----|
| 1. The Board has jurisdiction of a contractor's claim for quantities of cement delivered in excess of the aggregate estimated requirements for cement for the Glen Canyon Dam and Power Plant, irrespective of whether the contract is a requirements contract and without regard to whether the interpretation of the contract involves the determination of questions of fact, mixed questions of law and fact or questions of law only-----                      | 266 |
| 2. Under a contract for the delivery of cement for the Glen Canyon Dam and Power Plant, a contractor's claim for loss of commercial business or lost profits, attributed to the Government's failure to order cement in accordance with the estimated requirements set forth in the contract, will be dismissed as without the jurisdiction of the Board where neither the extras clause nor any other contract clause provides a remedy for the alleged wrong----- | 266 |

**Compensable Delays**

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|--|-----|
| 1. A finding that "first category" changed conditions were encountered at the construction site for a pumping plant does not warrant the payment of expenses associated either with reasonable delay associated with the discovery of the changed conditions or for "pure" delay (standby) costs that may have been necessitated by unreasonable delay in the issuance of a ruling concerning the claimed changed conditions; therefore, a claim for reimbursement of such expenses and costs will be dismissed----- | 132 |
| 2. Where changed conditions are encountered that not only necessitate additional work which is covered by unit prices, but also cause a delay in the commencement of a succeeding stage of the work, costs incurred in the performance of the succeeding stage and claimed to have resulted from such delay (wage differential and   |     |

**CONTRACTS—Continued**

**PERFORMANCE OR DEFAULT—Continued**

**Compensable Delays—Continued**

overtime bonus payments and the expense of moving equipment) are not directly related to the changed conditions and may not be included in an equitable adjustment-----	Page 196
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**Excusable Delays**

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|--|-----|
| 1. The contracting officer's determination on a contractor's entitlement to a time extension, by reason of alleged excusable causes of delay, will be sustained where the contractor fails to show that such determination is erroneous by a preponderance of the evidence and where it appears that the unexcused delays were attributable to manufacturing difficulties of a subcontractor or to a failure of the subcontractor's quality control-----   | 15  |
| 2. A contractor who bids on a Government contract unqualifiedly represents that it has the supervision, personnel, equipment, skill and ability to do the work and its responsibility is in nowise diminished by the fact that entire work covered thereby has been subcontracted; consequently, the absence of such qualifications is not an excusable cause of delay under the standard form of supply contract-----   | 15  |
| 3. Where, under a standard form of construction contract the contractor's right to proceed with the performance thereof is terminated for unsatisfactory progress and where it appears that the principal causes of the delay were the acts of the representative of the contracting officer, who willfully and arbitrarily interfered with and assumed control of the work under the contract, such causes are excusable and the contract will be deemed to have been terminated for the convenience of the Government----- | 63  |
| 4. Under a contract for the performance of survey work the contracting officer properly terminated the contract for default where the weight of the evidence supported a conclusion that following the receipt of letters warning the contractor to comply with the performance schedule, the contractor abandoned the work after a series of delays, due in part to Government error but caused principally by inadequate performance and financial difficulties-----   | 377 |

**Release and Settlement**

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| 1. Where the exceptions to a "Release on Contract" specifically designate particular claims and amounts as being excluded from the effect of the release, a further claim made thereafter, that cannot reasonably be considered to be within the claim enumerated in the exceptions is barred by the release provisions and will be dismissed----- | 196 |
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**DESERT LAND ENTRY**

**GENERALLY**

1. Section 7 of the act of Mar. 3, 1891, and section 2 of the act of Mar. 28, 1908, read together, and in the light of other provisions of the Desert Land Law indicated, a Congressional intention to prevent a consolidation of entries and to exclude corporations from control and reclamation of the entries. Consequently, the words "assign-

**DESERT LAND ENTRY—Continued**  
**GENERALLY—Continued**

ment" and "holding" are to be given a construction that will make the apparent purpose of the Act effective.....	Page 386
2. Section 7 of the act of Mar. 3, 1891, provides that no person or association of persons shall hold by assignment or otherwise, prior to the issue of patent, more than 320 acres of arid or desert lands.....	386
3. The terms "assignment," "hold" and "otherwise" as used in section 7 of the act of Mar. 3, 1891, are words of broad signification and their precise meanings depend on the context in which they are used.....	386
4. A corporation which has acquired actual possession or the right of actual possession to more than 320 acres of desert land "holds" such acreage within the meaning of the prohibition of section 7 of the act of Mar. 3, 1891.....	386
5. Until patent issues, the Secretary of the Interior retains jurisdiction to inquire, <i>sua sponte</i> , into the validity of an entry, completed except for issuance of the patent, and to set it aside for defects or mistakes existing on the date the entryman met the final requirements.....	387

**APPLICANT**

1. Section 1 of the act of Mar. 3, 1877, requires a desert land applicant to file a declaration under oath that he intends to reclaim the tract of desert land for which he is making application for entry and this intent to reclaim is of the very essence of the condition upon which the entry is permitted.....	387
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**APPLICATIONS**

1. Section 1 of the act of Mar. 3, 1877, requires a desert land applicant to file a declaration under oath that he intends to reclaim the tract of desert land for which he is making application for entry and this intent to reclaim is of the very essence of the condition upon which the entry is permitted.....	387
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**ASSIGNMENT**

1. An agreement between a desert land entryman and a corporation, which gives that corporation the exclusive right to possess the entry and to grow and harvest crops thereon for a term of twenty years, is an assignment to or for the benefit of a corporation within the meaning of the prohibition in section 2 of the act of Mar. 28, 1908.....	386
2. The term "assignment" as used in the act of Mar. 28, 1908, applies to a transfer to a corporation of the rights of a desert land entryman to enter upon the lands and remain in effective control thereof and to grow and harvest crops thereon for the benefit of the corporation.....	386
3. To determine whether an unlawful assignment of the desert entry was made one must look to the results of the documents used to determine the real nature of the agreement rather than to the labels the parties select for their designation.....	386
4. Section 7 of the act of Mar. 3, 1891, and section 2 of the act of Mar. 28, 1908, read together, and in the light of other provisions of the Desert Land Law indicated, a Congressional intention to prevent	

**DESERT LAND ENTRY—Continued****ASSIGNMENT—Continued**

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- a consolidation of entries and to exclude corporations from control and reclamation of the entries. Consequently, the words "assignment" and "holding" are to be given a construction that will make the apparent purpose of the Act effective... 386
5. Section 7 of the act of Mar. 3, 1891, provides that no person or association of persons shall hold by assignment or otherwise, prior to the issue of patent, more than 320 acres of arid or desert lands..... 386
6. The terms "assignment," "hold" and "otherwise" as used in section 7 of the act of Mar. 3, 1891, are words of broad signification and their precise meanings depend on the context in which they are used..... 386

**CANCELLATION**

1. A patent issued to an entryman who made an entry not in good faith but with intent to evade the provisions of the law was erroneously issued and obtained by fraudulent and improper means, and must be canceled..... 387

**CULTIVATION AND RECLAMATION**

1. In order to comply with the requirements of section 2 of the act of Mar. 3, 1891, a desert land entryman must either expend his own money on the necessary irrigation, reclamation, and cultivation of the entry or incur a personal liability for any money so expended..... 386
2. Section 1 of the act of Mar. 3, 1877, requires a desert land applicant to file a declaration under oath that he intends to reclaim the tract of desert land for which he is making application for entry and this intent to reclaim is of the very essence of the condition upon which the entry is permitted..... 387

**FINAL PROOF**

1. Until patent issues, the Secretary of the Interior retains jurisdiction to inquire, *sua sponte*, into the validity of an entry, completed except for issuance of the patent, and to set it aside for defects or mistakes existing on the date the entryman met the final requirements..... 387

**EQUITABLE ADJUDICATION**

1. Equitable adjudication is properly denied a homestead entryman where it appears that there has not been substantial compliance with the cultivation requirements of the law..... 218

**FEDERAL EMPLOYEES AND OFFICERS****AUTHORITY TO BIND GOVERNMENT**

1. Neither unauthorized acts by employees of the Bureau of Land Management nor erroneous information furnished by them can serve as the basis for conferring rights not authorized by law or for excusing the nonperformance of acts that are required by law to be performed before the vesting of a right..... 218

**GRAZING PERMITS AND LICENSES****GENERALLY****Page**

1. In a grazing district where land is base, a person who owns water rights is not entitled merely by reason of the ownership of such rights to grazing privileges on the land surrounding the waters in which the rights are claimed, and the allotment of such land to another user is not contrary to section 3 of the Taylor Grazing Act.....

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**APPEALS**

1. An appeal from a decision of a district grazing manager allotting the available Federal range in a grazing unit among the qualified users is properly dismissed where the allotment was based upon a range survey which showed that the allotment of each user contained sufficient forage to satisfy his Federal range demand and it is not shown that such an allotment does not, in fact, contain sufficient forage to satisfy the qualified demand or that the allotment of the unit was arbitrary or capricious.....

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**APPORTIONMENT OF FEDERAL RANGE**

1. In a grazing district where land is base, a person who owns water rights is not entitled merely by reason of the ownership of such rights to grazing privileges on the land surrounding the waters in which the rights are claimed, and the allotment of such land to another user is not contrary to section 3 of the Taylor Grazing Act.....
2. A permittee or licensee has no right to any particular area of the Federal range under the Taylor Grazing Act or the Federal Range Code and, although historical use is a factor to be considered in the determination of grazing privileges, the determination of the particular area in which the range user may exercise his grazing privileges is a matter committed to the discretion of the Department.....
3. It is not unreasonable or arbitrary to divide an area of the Federal range, formerly grazed in common, into allotments and to require fencing of the allotments when such action is found necessary to permit proper utilization of the range.....

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**HEARINGS**

1. In a hearing to determine an appeal from a district range manager's decision in which the appellant alleges that he has been deprived of part of his grazing privileges, the burden is upon the appellant to show by substantial probative evidence that his rights have been impaired.....

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**HOMESTEADS (ORDINARY)****GENERALLY**

1. At the expiration of two years after the issuance of a receipt upon the final entry of a tract of land under the homestead laws the entryman is entitled to receive a patent if there is no pending contest or protest against the validity of the entry at that time, but, in Alaska, where notice of the filing of final proof has not been published during the 2-year period, the issuance of a patent will be postponed until after notice has been published and the period for the filing of adverse claims has expired.....

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**HOMESTEADS (ORDINARY)—Continued**

**CANCELLATION OF ENTRY**

Page

1. Where the acts of cultivation performed for all but one year of the life of a homestead entry consisted of sowing seed on the land without disturbing the native vegetation, and where the entryman failed to apply artificial irrigation to desert-type land, without which he could not reasonably expect to produce a crop, his effort cannot be considered to have been cultivation, and his final proof is properly rejected and the entry canceled..... 218

**CULTIVATION**

1. Cultivation of a homestead entry must consist of acts and be done in such a manner as to be reasonably calculated to produce profitable results, and where the land is arid or semiarid and will not, in a normal year, produce a crop without artificial irrigation, cultivation which will meet the cultivation requirements of the homestead law must, of necessity, include the application of such amounts of water as may reasonably be required to produce a crop..... 218
2. Where the acts of cultivation performed for all but one year of the life of a homestead entry consisted of sowing seed on the land without disturbing the native vegetation, and where the entryman failed to apply artificial irrigation to desert-type land, without which he could not reasonably expect to produce a crop, his effort cannot be considered to have been cultivation, and his final proof is properly rejected and the entry canceled..... 218

**FINAL PROOF**

1. At the expiration of two years after the issuance of a receipt upon the the final entry of a tract of land under the homestead laws the entryman is entitled to receive a patent if there is no pending contest or protest against the validity of the entry at that time, but, in Alaska, where notice of the filing of final proof has not been published during the 2-year period, the issuance of a patent will be postponed until after notice has been published and the period for the filing of adverse claims has expired..... 25

**SECOND ENTRY**

1. A homestead settler who files a relinquishment of his location notice of settlement can make a second entry only if he is eligible to do so under the statute regulating second entries..... 70
2. A homestead settler who relinquishes his first location notice of settlement and is otherwise eligible to make a second entry can establish no rights under his second settlement until he files his relinquishment if he has maintained his rights under his first settlement up to the moment of relinquishment..... 71

**SETTLEMENTS**

1. A homestead settler who files a relinquishment of his location notice of settlement can make a second entry only if he is eligible to do so under the statute regulating second entries..... 70
2. A homestead settler who relinquishes his first location notice of settlement and is otherwise eligible to make a second entry can

**HOMESTEAD (ORDINARY)—Continued**  
**SETTLEMENTS—Continued**

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establish no rights under his second settlement until he files his  
 relinquishment if he has maintained his rights under his first  
 settlement up to the moment of relinquishment.....

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**INDIAN LANDS**  
**GENERALLY**

1. The San Carlos Apache Indian Reservation, Arizona, is a congressionally unconfirmed executive order reserve in which the Indians have no compensable interest as against the United States. The United States did not have to look to the act of June 7, 1924 (43 Stat. 475), which authorized the construction of the San Carlos Irrigation Project for the benefit of the Indians of the Gila River Indian Reservation, Arizona, and others, for authority to acquire lands on the San Carlos Reservation needed for dam and reservoir purposes. As the United States already owned the lands free and clear of any legally cognizable obligation to the Indians, they could be and were devoted to the use of the Project by administrative act.....

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**RIGHTS-OF-WAY**

1. Additionally, the authority granted by the Act of June 7, 1924, to acquire rights-of-way for the project would not have limited the Government to acquiring estates in the nature of flowage easements. Even if the United States had been forced to look to that Act for authority to acquire the lands in question it could have acquired fee simple estates in them.....

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**INDIAN WATER AND POWER RESOURCES**  
**IRRIGATION PROJECTS**

1. The lands of the San Carlos Dam and Reservoir are owned by the United States in connection with the San Carlos Irrigation Project. As a matter of grace the Indians were fully compensated for them when they were put to use in connection with the Project. Accordingly, under the act of Apr. 4, 1938, 52 Stat. 193 (25 U.S.C. sec. 390), the proceeds derived from the granting of concessions and leases on the lands should be used for the operation and maintenance of the San Carlos Irrigation Project.....

333

**LABOR**  
**WAGE RATES**

1. Under a contract escalation clause providing for partial reimbursement to the contractor in the event of increases in wage rates, exclusive of subsistence payments, where new schedules of compensation paid by the contractor are based upon union agreements providing for successively higher increments of pay dependent upon the increasing degree of remoteness of the work site from the union office, and discontinuing previous arrangements for payments of sums designated as subsistence, the new compensation schedules are deemed to contain a measure of subsistence payments, but are determined also to require an equitable adjustment for amounts that are eligible for reimbursement under the escalation provisions of the contract.....

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**MINERAL LANDS****GENERALLY**

Page

1. Lands within coal leases are considered to be "producible" within the meaning of Rev. Stat. sec. 2276, as amended, where there is a well-defined and large deposit of coal outcropping on the land which can be easily strip-mined from the outcrops. State indemnity selections for such lands or for any other lands included in the leases are properly rejected..... 207

**LEASES**

2. Lands within coal leases are considered to be "producible" within the meaning of Rev. Stat. sec. 2276, as amended, where there is a well-defined and large deposit of coal outcropping on the land which can be easily strip-mined from the outcrops. State indemnity selections for such lands or for any other lands included in the leases are properly rejected..... 207

**MINERAL LEASING ACT****GENERALLY**

1. The provisions of section 21 of the Mineral Leasing Act for the leasing of bitumen and bituminous rock or sand do not conflict with the oil and gas leasing provisions of section 17 of the act and do not impair the contractual rights of an oil and gas lessee under the latter provision, and a protest against such alleged impairment of rights is properly dismissed..... 211
2. A holder of a mining claim located after the enactment of the Mineral Leasing Act has no statutory or regulatory preference right to a phosphate prospecting permit simply because some phosphate is discovered on his claim; his application for a permit is therefore subordinate to an application for a permit filed prior to his..... 305
3. Minerals such as phosphate which are subject to disposition under the Mineral Leasing Act of 1920 have not been subject to location under the mining laws since the enactment of that act; in order for any claimant locating a mining claim thereafter for minerals subject to the mining laws to have any rights to phosphate within his claim, his claim must be validated by a discovery of a valuable deposit of a mineral locatable under the mining laws prior to the time when the land is known to be valuable for a leasable mineral or an application for a permit or lease for a leasable mineral is filed..... 305

**LANDS SUBJECT TO**

1. The holder of a valid mining claim located after Feb. 25, 1920, cannot file and maintain an application for a phosphate prospecting permit for land in his claim unless he relinquishes his claim or files a waiver of his rights to Leasing Act minerals in the claim... 306

**MINING CLAIMS****GENERALLY**

1. A relinquishment of a claim to land that is secured through misrepresentation, fraud, or deceit is void, but a relinquishment given simply to avoid facing adverse proceedings by the Bureau of Land Management will be regarded as having been voluntarily executed, and its effect will not be nullified..... 123



**MINING CLAIMS—Continued**  
**GENERALLY—Continued**

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| 2. A holder of a mining claim located after the enactment of the Mineral Leasing Act has no statutory or regulatory preference right to a phosphate prospecting permit simply because some phosphate is discovered on his claim; his application for a permit is therefore subordinate to an application for a permit filed prior to his..... | 305  |
| 3. The holder of a valid mining claim located after Feb. 25, 1920, cannot file and maintain an application for a phosphate prospecting permit for land in his claim unless he relinquishes his claim or files a waiver of his rights to Leasing Act minerals in the claim..   | 306  |

**CONTESTS**

- |   |    |
|---|----|
| 1. In accordance with the pertinent regulations notice of hearing in a Government contest must be sent to the contestee in time for him to receive actual or constructive notice at least 30 days in advance of the scheduled date of the hearing, and, where such timely notice is not given, the contestee will not be chargeable with failure to appear at the hearing and a decision based upon the hearing from which he was absent will be set aside..... | 82 |
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**DETERMINATION OF VALIDITY**

- |  |     |
|--|-----|
| 1. No hearing is necessary to declare mining claims void <i>ab initio</i> where the records of the Department show that at the time of location of the claims the land was not open to such location.....  | 123 |
| 2. Because Congress expressly limited the effect of proceedings under the Surface Resources Act, a determination under that act that a mining claim is subject to the limitations and restrictions as to the surface resources of the claim provided in section 4 of the act because of a lack of a valid discovery on the claim does not invalidate his claim or operate as <i>res judicata</i> on the issue of discovery in the event of contest proceedings initiated by the United States or a proceeding brought under section 7 of the Multiple Mineral Development Act..... | 305 |

**DISCOVERY**

- |  |     |
|--|-----|
| 1. To constitute a valid discovery upon a lode mining claim there must be a discovery on the claim of a lode or vein bearing mineral which would warrant a prudent man in the expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine; it is not sufficient that there is only a meagre surface showing in veins or lodes which, considered with knowledge of the geology of the area and of the successful mining operations conducted on adjoining claims, would warrant further exploration in the hope of finding a valuable deposit in a separate vein or lode at depth..... | 184 |
| 2. Because Congress expressly limited the effect of proceedings under the Surface Resources Act, a determination under that act that a mining claim is subject to the limitations and restrictions as to the surface resources of the claim provided in section 4 of the act because of a lack of a valid discovery on the claim does not invalidate his claim or operate as <i>res judicata</i> on the issue of discovery in the event of contest proceedings initiated by the United States or a proceeding brought under section 7 of the Multiple Mineral Development Act.....   | 305 |

**MINING CLAIMS—Continued****LANDS SUBJECT TO**

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1. Land which has been classified as suitable for disposition under the Small Tract Act is not open to location under the mining laws. 123
2. Minerals such as phosphate which are subject to disposition under the Mineral Leasing Act of 1920 have not been subject to location under the mining laws since the enactment of that act; in order for any claimant locating a mining claim thereafter for minerals subject to the mining laws to have any rights to phosphate within his claim, his claim must be validated by a discovery of a valuable deposit of a mineral locatable under the mining laws prior to the time when the land is known to be valuable for a leasable mineral or an application for a permit or lease for a leasable mineral is filed. 305

**MILL SITES**

1. The sinking of wells and the construction of substantial improvements for the conveyance and utilization of water therefrom in mining operations are sufficient to justify the use of the land as a mill site. 172

**MINERAL LANDS**

1. The Secretary of the Interior is not precluded from classifying land as chiefly valuable for small tract purposes solely because it is known to contain minerals, and, where such land is so classified, he is under no obligation to issue regulations providing for mineral location of mineral deposits reserved from disposition under the Small Tract Act. 123

**MINING OCCUPANCY ACT****GENERALLY**

1. The term "improvements" includes any structures of a permanent nature placed upon land which tend to increase the value of land but excludes a house trailer or other mobile property which is not permanently affixed to the land. 373

**PRINCIPAL PLACE OF RESIDENCE**

1. Where a mining claimant resided upon an unpatented mining claim for twenty years or more prior to October 23, 1962, and constructed thereon substantial improvements, intended to serve as the permanent residence of the claimant, but, prior to that date, moved for a time from the mining claim and rented the improvements to other parties for residential use, the claimant may be found to have been, on that date, a "residential occupant-owner" of such improvements as "a principal place of residence" within the meaning of the act of Oct. 23, 1962, where it appears that the claimant's removal was for good reason and was not voluntary, the evidence shows that during the entire period in which the property was rented the claimant reserved a portion of it for her own use, and there is credible evidence that on Oct. 23, 1962, the claimant was actually residing on the claim. 53
2. The term "valuable improvements" which constitute "a principal place of residence," as used in section 2 of the act of Oct. 23, 1962, must include a presently habitable dwelling place, and this requirement is not satisfied by a one-room cabin which lacks all

**MINING OCCUPANCY ACT—Continued**  
**PRINCIPAL PLACE OF RESIDENCE—Continued**

of the conveniences normally associated with residence, including plumbing and electricity, and is suitable only as a shelter from the elements.....

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**QUALIFIED APPLICANT**

1. Where a mining claimant resided upon an unpatented mining claim for twenty years or more prior to Oct. 23, 1962, and constructed thereon substantial improvements, intended to serve as the permanent residence of the claimant, but, prior to that date, moved for a time from the mining claim and rented the improvements to other parties for residential use, the claimant may be found to have been, on that date, a "residential occupant-owner" of such improvements as "a principal place of residence" within the meaning of the act of Oct. 23, 1962, where it appears that the claimant's removal was for good reason and was not voluntary, the evidence shows that during the entire period in which the property was rented the claimant reserved a portion of it for her own use, and there is credible evidence that on Oct. 23, 1962, the claimant was actually residing on the claim.....
2. A qualified applicant for conveyance of land under the act of Oct. 23, 1962, must have been, on that date, a residential occupant-owner of valuable improvements in an unpatented mining claim which constituted for him a principal place of residence, and an application is properly rejected where it appears that the applicant's use of the land applied for has been limited to approximately four months' occupancy per year and there is no evidence that weather or topography or other factor made it practically impossible for him to use the site as a residence during the remaining eight months but, on the contrary, the evidence shows that during the eight months the applicant lived as a matter of choice with his children away from the claim.....
3. A qualified applicant for conveyance of land under the act of Oct. 23, 1962, must have been, on that date, a residential occupant-owner of valuable improvements in an unpatented mining claim which constituted for him a principal place of residence, and where there were not, on that date, improvements on the land suitable for residence, an applicant is not qualified under the act, and his application is properly rejected.....

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373

**MULTIPLE MINERAL DEVELOPMENT ACT**  
**GENERALLY**

1. Because Congress expressly limited the effect of proceedings under the Surface Resources Act, a determination under that act that a mining claim is subject to the limitations and restrictions as to the surface resources of the claim provided in section 4 of the act because of a lack of a valid discovery on the claim does not invalidate his claim or operate as *res judicata* on the issue of discovery in the event of contest proceedings initiated by the United States or a proceeding brought under section 7 of the Multiple Mineral Development Act.....

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**NATIONAL PARK SERVICE AREAS**

**LAND**

**Use**

**Page**

1. The act of Sept. 12, 1964, establishing Canyonlands National Park, authorized the issuance of renewal grazing privileges in the Park for a maximum of ten years beyond the termination dates of privileges in existence on the date of enactment..... 81

**NOTICE**

1. In accordance with the pertinent regulations notice of hearing in a Government contest must be sent to the contestee in time for him to receive actual or constructive notice, at least 30 days in advance of the scheduled date of the hearing, and, where such timely notice is not given, the contestee will not be chargeable with failure to appear at the hearing and a decision based upon the hearing from which he was absent will be set aside..... 82
2. Under the Department's regulation governing service of documents service by registered or certified mail may be proved by showing that the document required to be served could not be delivered to the addressee at his record address because of various reasons and, where such constructive service is relied upon, a document will be considered to have been served at the time of the return by the post office of the undelivered registered or certified letter.. 82

**OIL AND GAS LEASES**

**GENERALLY**

1. Where the Bureau of Land Management has required a State, which filed a swamp-land selection, to contest a Federal oil and gas lease by establishing evidence at a hearing as to the character of the land at the date of the Swamp Land Act, the Department is not limited in its consideration of the State's application to the sole question of the character of the land at the date of the Swamp Land Act, but may also resolve any legal issues which will determine whether title should be approved in the State..... 148
2. The provisions of section 21 of the Mineral Leasing Act for the leasing of bitumen and bituminous rock or sand do not conflict with the oil and gas leasing provisions of section 17 of the act and do not impair the contractual rights of an oil and gas lessee under the latter provision, and a protest against such alleged impairment of rights is properly dismissed..... 211

**APPLICATIONS**

**Generally**

1. Regulations should be so clear that there is no basis for an oil and gas lease applicant's noncompliance with them before they are interpreted so as to deprive him of a statutory preference right to a lease..... 293

**Attorneys-in-Fact or Agents**

1. The regulations requiring an agent of an offeror for an oil and gas lease to accompany the offer with evidence of the agent's authority to sign the offer in behalf of the offeror will not be applied to reject offers filed in the name of a person who is indicated in a supplemental statement to the offer to be acting as an agent for another person who has 100 percent interest in the lease and offer and is disig-

**OIL AND GAS LEASES—Continued****APPLICATIONS—Continued****Attorneys-in-Fact or Agents—Continued**

nated as a party in interest on the offer form, where the language of the regulations does not clearly require such evidence when the offer is in the name of the agent as the offeror and signed by him as offeror. Also, the agent will not be deemed unqualified to obtain a lease in his own name simply because another person is to obtain 100 percent interest in the lease and the other person's interest in the lease and offer is revealed, in the absence of clear regulatory provisions prohibiting such a practice-----

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**Sole Party in Interest**

1. When an oil and gas lease offer, filed on a drawing entry card, contains the name of an additional party in interest, and the required statement of interest, copy or explanation of the agreement between the parties, and evidence of the qualifications of the additional party to hold such interest are not filed within the time allowed by the Department's regulations, the offer is properly rejected-----
2. The regulations requiring an agent of an offeror for an oil and gas lease to accompany the offer with evidence of the agent's authority to sign the offer in behalf of the offeror will not be applied to reject offers filed in the name of a person who is indicated in a supplemental statement to the offer to be acting as an agent for another person who has 100 percent interest in the lease and offer and is designated as a party in interest on the offer form, where the language of the regulations does not clearly require such evidence when the offer is in the name of the agent as the offeror and signed by him as offeror. Also, the agent will not be deemed unqualified to obtain a lease in his own name simply because another person is to obtain 100 percent interest in the lease and the other person's interest in the lease and offer is revealed, in the absence of clear regulatory provisions prohibiting such a practice-----
3. An oil and gas lease offer when filed is defective under the regulations when the offeror states that she is not the sole party in interest and indicates that another person will acquire full interest in the lease, but does not properly identify the individual by stating both his given and his surname; however, the offer may be considered as being cured and having priority when a supplemental statement is submitted signed by the offeror and the other interested party properly identifying him-----

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**ASSIGNMENTS OR TRANSFERS**

1. Where the assignee is a corporation, the requirements of the regulation, 43 CFR 3128.6, pertaining to filing of an assignment of royalty interests in an oil and gas lease apply only to corporations and not to its stockholders-----

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**CANCELLATION**

1. Where the Bureau of Land Management has required a State, which filed a swampland selection, to contest a Federal oil and gas lease by establishing evidence at a hearing as to the character of the land at the date of the Swamp Land Act, the Department

**OIL AND GAS LEASES—Continued**  
**CANCELLATION—Continued**

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- is not limited in its consideration of the State's application to the sole question of the character of the land at the date of the Swamp Land Act, but may also resolve any legal issues which will determine whether title should be approved in the State..... 148
2. Land grants are construed in favor of the United States and therefore any doubts as to the inapplicability of a State grant to lands leased for oil and gas purposes by the United States as Federal lands, which would necessitate the cancellation of the lease, should be resolved in favor of the United States..... 148

**EXTENSIONS**

1. Where a noncompetitive oil and gas lessee files an informal application for a 5-year extension and is allowed 30 days by the land office to file a formal application, upon the lessee's subsequent appeal from the land office decision and the final affirmation of that decision, the lessee will be allowed 30 days from the date of such final affirmation within which to comply or to have his lease declared terminated..... 211

**FIRST QUALIFIED APPLICANT**

1. The regulations requiring an agent of an offeror for an oil and gas lease to accompany the offer with evidence of the agent's authority to sign the offer in behalf of the offeror will not be applied to reject offers filed in the name of a person who is indicated in a supplemental statement to the offer to be acting as an agent for another person who has 100 percent interest in the lease and offer and is designated as a party in interest on the offer form, where the language of the regulations does not clearly require such evidence when the offer is in the name of the agent as the offeror and signed by him as offeror. Also, the agent will not be deemed unqualified to obtain a lease in his own name simply because another person is to obtain 100 percent interest in the lease and the other person's interest in the lease and offer is revealed, in the absence of clear regulatory provisions prohibiting such a practice. 293

**LANDS SUBJECT TO**

1. Where the Bureau of Land Management has required a State, which filed a swampland selection, to contest a Federal oil and gas lease by establishing evidence at a hearing as to the character of the land at the date of the Swamp Land Act, the Department is not limited in its consideration of the State's application to the sole question of the character of the land at the date of the Swamp Land Act, but may also resolve any legal issues which will determine whether title should be approved in the State.... 148

**PRODUCTION**

1. The term "cost of production," as used in a particular unit agreement and as applied to a gas well, includes the cost of pipe line construction and well connection which are required before the well can be produced..... 110

## OIL AND GAS LEASES—Continued

## RENTALS

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|   | Page |
| 1. An oil and gas lease is automatically terminated under section 31 of the Mineral Leasing Act, as amended by the act of July 29, 1954, when the rental is not paid in full on or before the due date, even if payment is timely and the deficiency is slight..... | 211  |
| 2. The proper rental payment must be made when due for each oil and gas lease held, and a deficiency in the rental remittance for one lease cannot be cured by an excess remittance in the rental payment or the filing fee for another lease or lease offer.....   | 211  |

## ROYALTIES

- |   |    |
|---|----|
| 1. Where the assignee is a corporation, the requirements of the regulation, 43 CFR 3128.6, pertaining to filing of an assignment of royalty interests in an oil and gas lease apply only to corporations and not to its stockholders..... | 77 |
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## TERMINATION

- |   |     |
|---|-----|
| 1. An oil and gas lease is automatically terminated under section 31 of the Mineral Leasing Act, as amended by the act of July 29, 1954, when the rental is not paid in full on or before the due date, even if payment is timely and the deficiency is slight..... | 211 |
|---|-----|

## UNIT AND COOPERATIVE AGREEMENTS

- |  |     |
|--|-----|
| 1. Under a unit agreement which defines a "producing well" as "a well capable of producing unitized substances in quantities sufficient to pay the cost of production," a gas well is not properly held to be producible where it appears that the prorated costs of connecting the well to a pipeline for production were not considered in determining the cost of production and where it appears that had this cost been considered the well would not at any time have justified the expenditure of the sum required to connect it and to bring it into production..... | 111 |
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## WELL CAPABLE OF PRODUCTION

- |   |     |
|---|-----|
| 1. The term "producing well" means substantially the same as "well capable of producing in paying quantities" which, as applied to a gas well, is a well which at the very least is capable of producing in sufficient quantity to pay the lessee a profit, though small, over operating and marketing expenses, although it may never repay the cost of drilling the well.....   | 110 |
| 2. Under a unit agreement which defines a "producing well" as "a well capable of producing unitized substances in quantities sufficient to pay the cost of production," a gas well is not properly held to be producible where it appears that the prorated costs of connecting the well to a pipe line for production were not considered in determining the cost of production and where it appears that had this cost been considered the well would not at any time have justified the expenditure of the sum required to connect it and to bring it into production..... | 111 |

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1. Under a unit agreement which defines a "producible well" as "a well capable of producing unitized substances in quantities sufficient to pay the cost of production," a gas well is not properly held to be producible where it appears that the prorated costs of connecting the well to a pipe line for production were not considered in determining the cost of production and where it appears that had this cost been considered the well would not at any time have justified the expenditure of the sum required to connect it and bring it into production----- 111

PATENTS OF PUBLIC LANDS

GENERALLY

1. At the expiration of two years after the issuance of a receipt upon the final entry of a tract of land under the homestead laws the entryman is entitled to receive a patent if there is no pending contest or protest against the validity of the entry at that time, but, in Alaska, where notice of the filing of final proof has not been published during the 2-year period, the issuance of a patent will be postponed until after notice has been published and the period for the filing of adverse claims has expired----- 25

EFFECT

1. Until patent issues, the Secretary of the Interior retains jurisdiction to inquire, *sua sponte*, into the validity of an entry, completed except for issuance of the patent, and to set it aside for defects or mistakes existing on the date the entryman met the final requirements----- 387

PHOSPHATE LEASES AND PERMITS

GENERALLY

1. Prospecting permits for phosphate may be allowed only for lands in any "unclaimed, undeveloped area"; therefore, they cannot be issued for lands covered by mining claims which have been determined simply to be subject to the limitations and restrictions imposed by section 4 of the Surface Resources Act after a proceeding brought under that act----- 305
2. The holder of a valid mining claim located after Feb. 25, 1920, cannot file and maintain an application for a phosphate prospecting permit for land in his claim unless he relinquishes his claim or files a waiver of his rights to Leasing Act minerals in the claim----- 306

PERMITS

1. A holder of a mining claim located after the enactment of the Mineral Leasing Act has no statutory or regulatory preference right to a phosphate prospecting permit simply because some phosphate is discovered on his claim; his application for a permit is therefore subordinate to an application for a permit filed prior to his----- 305
2. Prospecting permits for phosphate may be allowed only for lands in any "unclaimed, undeveloped area"; therefore, they cannot be issued for lands covered by mining claims which have been determined simply to be subject to the limitations and restrictions imposed by section 4 of the Surface Resources Act after a proceeding brought under that act----- 305



**PUBLIC LANDS****GENERALLY**

1. A description of public land is legally sufficient if the land is adequately and accurately identified in accordance with the public land survey system, even though the county in which the land is situated is incorrectly designated----- 123

**CLASSIFICATION**

1. An applicant for or claimant of public land is not entitled as a matter of right to a hearing for determining the proper classification of land to which he seeks title----- 123

**JURISDICTION OVER**

1. Where the Bureau of Land Management has required a State, which filed a swampland selection, to contest a Federal oil and gas lease by establishing evidence at a hearing as to the character of the land at the date of the Swamp Land Act, the Department is not limited in its consideration of the State's application to the sole question of the character of the land at the date of the Swamp Land Act, but may also resolve any legal issues which will determine whether title should be approved in the State---- 148

**RIPARIAN RIGHTS**

1. Generally meander lines are not to be treated as boundaries, and when the United States conveys a tract of land which is shown by the official plat of survey to border on a navigable river the purchaser takes title up to the water line, but where it is shown that the meander line shown on the plat did not approximate the course of the meandered river and that substantial areas of land remained unsurveyed because of error on the part of the surveyor, the purchaser may be limited in his conveyance to those lands lying outside the meander line, as shown on the official plat of survey, and lands lying between the original meander line and the bank of the river may be surveyed as public lands of the United States----- 281

**REGULATIONS****APPLICABILITY**

1. Regulations should be so clear that there is no basis for an oil and gas lease applicant's noncompliance with them before they are interpreted so as to deprive him of a statutory preference right to a lease----- 293
2. The regulations requiring an agent of an offeror for an oil and gas lease to accompany the offer with evidence of the agent's authority to sign the offer in behalf of the offeror will not be applied to reject offers filed in the name of a person who is indicated in a supplemental statement to the offer to be acting as an agent for another person who has 100 percent interest in the lease and offer and is designated as a party in interest on the offer form, where the language of the regulations does not clearly require such evidence when the offer is in the name of the agent as the offeror and signed by him as offeror. Also, the agent will not be deemed unqualified to obtain a lease in his own name simply because another person is to obtain 100 percent interest in the lease and the other person's interest in the lease and offer is revealed, in the absence of clear regulatory provisions prohibiting such a practice. 293

**REGULATIONS—Continued**  
**INTERPRETATION**

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1. Regulations should be so clear that there is no basis for an oil and gas lease applicant's noncompliance with them before they are interpreted so as to deprive him of a statutory preference right to a lease..... 293

**RIGHTS-OF-WAY**

**GENERALLY**

1. The Department will not deny an application for a right-of-way to transport water from a mill site for use on a mining claim upon the basis of a protest that the use of the water will deplete the underground water available to agricultural users of such water where it appears that under the water law of the State (California) the agricultural users have a remedy at law to protect their interests; the Department will not adjudicate the water rights of the parties..... 172

**ACT OF FEBRUARY 15, 1901**

1. The Department will not deny an application for a right-of-way to transport water from a mill site for use on a mining claim upon the basis of a protest that the use of the water will deplete the underground water available to agricultural users of such water where it appears that under the water law of the State (California) the agricultural users have a remedy at law to protect their interests; the Department will not adjudicate the water rights of the parties..... 172

**RULES OF PRACTICE**

**GENERALLY**

1. Under the Department's regulation governing service of documents service by registered or certified mail may be proved by showing that the document required to be served could not be delivered to the addressee at his record address because of various reasons and, where such constructive service is relied upon, a document will be considered to have been served at the time of the return by the post office of the undelivered registered or certified letter.. 82

**APPEALS**

**Generally**

1. A motion for reconsideration of a decision will be denied where the grounds upon which the motion is based are not valid or have been given full consideration by the Board is arriving in the decision..... 49

**Burden of Proof**

1. Where in construing a contract for a digital dispatching system the contractor's interpretation excludes any obligation on its part to furnish a single set of B-constants for calculating transmission system losses, but concedes that it is required to furnish as a part of the system an economic dispatch program including water optimization and transmission losses and that one set of B-constants is essential for an accurate consideration of transmission losses, and hence it appears that one set of B-constants must

## RULES OF PRACTICE—Continued

## APPEALS—Continued

## Burden of Proof—Continued

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| <p>be furnished in order to complete the system, the contractor's interpretation of the contract requirement is unreasonable, precluding the doctrine of <i>contra proferentem</i>, notwithstanding the contractor's unsupported assertion that a trade practice and precedents substantiate its interpretation.....</p> <p>2. When an appellant has submitted evidence of a substantial nature tending to establish that rock, within the meaning of the specifications, was encountered and removed, and the Government offers little, if any, counter proof the contention of the appellant must be accepted.....</p> | <p>95</p> <p>349</p> |
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## Dismissal

- |   |  |
|---|--|
| <p>1. When an appeal to the Director is dismissed for failure to file a timely statement of reasons, and that decision is not appealed, the party has no standing to revivify subsequently in an appeal on another matter to the Secretary the substantive issue involved in the other case and the decisions below are final.....</p> <p>2. A finding that "first category" changed conditions were encountered at the construction site for a pumping plant does not warrant the payment of expenses associated either with reasonable delay associated with the discovery of the changed conditions or for "pure" delay (standby) costs that may have been necessitated by unreasonable delay in the issuance of a ruling concerning the claimed changed conditions; therefore, a claim for reimbursement of such expenses and costs will be dismissed.....</p> <p>3. Where the exceptions to a "Release on Contract" specifically designate particular claims and amounts as being excluded from the effect of the release, a further claim made thereafter, that cannot reasonably be considered to be within the claim enumerated in the exceptions is barred by the release provisions and will be dismissed.....</p> <p>4. Under a contract for the delivery of cement for the Glen Canyon Dam and Power Plant, a contractor's claim for loss of commercial business or lost profits, attributed to the Government's failure to order cement in accordance with the estimated requirements set forth in the contract, will be dismissed as without the jurisdiction of the Board where neither the extras clause nor any other contract clause provides a remedy for the alleged wrong.....</p> <p>5. A construction contractor disputed a contracting officer's requirement that "Line Construction" classifications and pay scales be applied to workmen who assembled and erected steel transmission line towers, contending that it would be proper to utilize "Ironworker, structurals" classifications and pay scales (workers in the latter classifications received lower rates of pay). Minimum wage rates for both classification types were incorporated in the contract under the Davis-Bacon Act. The Department of Labor upheld the contracting officer's ruling after considering the matter on two occasions and holding a hearing as part of its second review; in addition, the contractor asked for, and received, consideration (and reconsideration) of the dispute by the Comptroller</p> | <p>70</p> <p>132</p> <p>196</p> <p>266</p> |
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**RULES OF PRACTICE—Continued****APPEALS—Continued****Dismissal—Continued**

General of the United States. The Comptroller General also concluded that the contracting officer's classification action was correct. In such circumstances, the Board declined to exercise jurisdiction over an appeal involving the same matter, referred to it under the "Disputes" clause of the contract, and entered an order of dismissal.....

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**Standing to Appeal**

1. When an appeal to the Director is dismissed for failure to file a timely statement of reasons, and that decision is not appealed, the party has no standing to revivify subsequently in an appeal on another matter to the Secretary the substantive issue involved in the other case and the decisions below are final.....

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**HEARINGS**

1. In accordance with the pertinent regulations notice of hearing in a Government contest must be sent to the contestee in time for him to receive actual or constructive notice at least 30 days in advance of the scheduled date of the hearing, and, where such timely notice is not given, the contestee will not be chargeable with failure to appear at the hearing and a decision based upon the hearing from which he was absent will be set aside.....
2. An applicant for or claimant of public land is not entitled as a matter of right to a hearing for determining the proper classification of land to which he seeks title.....
3. A request for hearing will be denied where no facts are alleged which, if proved, would warrant the granting of the relief sought.....
4. Where the Bureau of Land Management has required a State, which filed a swampland selection, to contest a Federal oil and gas lease by establishing evidence at a hearing as to the character of the land at the date of the Swamp Land Act, the Department is not limited in its consideration of the State's application to the sole question of the character of the land at the date of the Swamp Land Act, but may also resolve any legal issues which will determine whether title should be approved in the State.....
5. A hearing need not be held to determine the propriety of a survey of lands as public lands of the United States where the protestants against such survey fail to support their protest with evidence or the proffer of evidence tending to show error in the supposed facts relied upon by the Bureau of Land Management as the basis for the survey.....

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**PRIVATE CONTESTS**

1. Where the Bureau of Land Management has required a State, which filed a swampland selection, to contest a Federal oil and gas lease by establishing evidence at a hearing as to the character of the land at the date of the Swamp Land Act, the Department is not limited in its consideration of the State's application to the sole question of the character of the land at the date of the Swamp Land Act, but may also resolve any legal issues which will determine whether title should be approved in the State.....

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## RULES OF PRACTICE—Continued

## SUPERVISORY AUTHORITY OF SECRETARY

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1. Until patent issues, the Secretary of the Interior retains jurisdiction to inquire, *sua sponte*, into the validity of an entry, completed except for issuance of the patent, and to set it aside for defects or mistakes existing on the date the entryman met the final requirements.....

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## SCHOOL LANDS

## INDEMNITY SELECTIONS

1. Lands within coal leases are considered to be "producible" within the meaning of Rev. Stat. sec. 2276, as amended, where there is a well-defined and large deposit of coal outcropping on the land which can be easily strip-mined from the outcrops. State indemnity selections for such lands or for any other lands included in the leases are properly rejected.....

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## SECRETARY OF THE INTERIOR

1. The Secretary of the Interior is authorized, and is under a duty, to consider and determine what lands are public lands, what public lands have been or should be surveyed, and what public lands have been or remain to be disposed of by the United States, and he has the authority to extend or correct the surveys of public lands as may be necessary, including the surveying of lands omitted from earlier surveys.....

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## SMALL TRACT ACT

## CLASSIFICATION

1. Land which has been classified as suitable for disposition under the Small Tract Act is not open to location under the mining laws.....
2. The Secretary of the Interior is not precluded from classifying land as chiefly valuable for small tract purposes solely because it is known to contain minerals, and, where such land is so classified, he is under no obligation to issue regulations providing for mineral location of mineral deposits reserved from disposition under the Small Tract Act.....
3. A classification of public land as suitable for disposal under the Small Tract Act will not be disturbed in the absence of substantial positive evidence that the classification is erroneous.....

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## STATE GRANTS

1. A selection made in behalf of the State of Louisiana under the Internal Improvement Act of Sept. 4, 1841, prior to the Swamp Land Act of March 2, 1849, but approved thereafter, is considered as appropriating the land and precluding the grant of swamplands to the State under the 1849 act, and a subsequent relinquishment of the State's claim under the 1841 act many years later cannot effectuate the grant under the Act of 1849 or the general Swamp Land Act of Sept. 28, 1850, since they are grants *in praesenti* operating upon facts as of their dates of the enactment, and do not apply to facts which have changed after their enactment.....
2. Where the Bureau of Land Management has required a State, which filed a swampland selection, to contest a Federal oil and gas lease by establishing evidence at a hearing as to the character of the land at the date of the Swamp Land Act, the Department is not

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## STATE GRANTS—Continued

limited in its consideration of the State's application to the sole question of the character of the land at the date of the Swamp Land Act, but may also resolve any legal issues which will determine whether title should be approved in the State.....	Page 148
3. Land grants are construed in favor of the United States and therefore any doubts as to the inapplicability of a State grant to lands leased for oil and gas purposes by the United States as Federal lands, which would necessitate the cancellation of the lease, should be resolved in favor of the United States.....	148
4. A selection filed by the State of Alaska for lands granted to it by the Statehood Act which is accepted by the land office and posted on the public land records segregates the land from all appropriations based on settlement and location so long as it remains of record, despite the fact that the selected land was in a withdrawal at the time the State filed its selection.....	1
5. While in general an application or selection filed by a State for land while it is withdrawn is invalid and does not become valid upon revocation of the withdrawal, the rule against premature filing was adopted for administrative convenience and to insure equality of opportunity to file and where these considerations are not pertinent, amendments to a premature application filed by the State during a statutory preference-right period and thereafter may be accepted as reaffirmations of the original filing and treated as though the State had refiled its original application at the time of the amendments.....	1

## STATUTORY CONSTRUCTION

## GENERALLY

1. Land grants are construed in favor of the United States and therefore any doubts as to the inapplicability of a State grant to lands leased for oil and gas purposes by the United States as Federal lands, which would necessitate the cancellation of the lease, should be resolved in favor of the United States.....	148
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## SURFACE RESOURCES ACT

## GENERALLY

1. Because Congress expressly limited the effect of proceedings under the Surface Resources Act, a determination under that act that a mining claim is subject to the limitations and restrictions as to the surface resources of the claim provided in section 4 of the act because of a lack of a valid discovery on the claim does not invalidate his claim or operate as <i>res judicata</i> on the issue of discovery in the event of contest proceedings initiated by the United States or a proceeding brought under section 7 of the Multiple Mineral Development Act.....	305
2. Prospecting permits for phosphate may be allowed only for lands in any "unclaimed, undeveloped area"; therefore, they cannot be issued for lands covered by mining claims which have been determined simply to be subject to the limitations and restrictions imposed by section 4 of the Surface Resources Act after a proceeding brought under that act.....	305

## SURVEYS OF PUBLIC LANDS

## GENERALLY

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1. A description of public land is legally sufficient if the land is adequately and accurately identified in accordance with the public land survey system, even though the county in which the land is situated is incorrectly designated.----- 123
2. The Secretary of the Interior is authorized, and is under a duty, to consider and determine what lands are public lands, what public lands have been or should be surveyed, and what public lands have been or remain to be disposed of by the United States, and he has the authority to extend or correct the surveys of public lands as may be necessary, including the surveying of lands omitted from earlier surveys.----- 280
3. Generally meander lines are not to be treated as boundaries, and when the United States conveys a tract of land which is shown by the official plat of survey to border on a navigable river the purchaser takes title up to the water line, but where it is shown that the meander line shown on the plat did not approximate the course of the meandered river and that substantial areas of land remained unsurveyed because of error on the part of the surveyor, the purchaser may be limited in his conveyance to those lands lying outside the meander line, as shown on the official plat of survey, and lands lying between the original meander line and the bank of the river may be surveyed as public lands of the United States.----- 281

## AUTHORITY TO MAKE

1. The Secretary of the Interior is authorized, and is under a duty, to consider and determine what lands are public lands, what public lands have been or should be surveyed, and what public lands have been or remain to be disposed of by the United States, and he has the authority to extend or correct the surveys of public lands as may be necessary, including the surveying of lands omitted from earlier surveys.----- 280

## SWAMPLANDS

1. A selection made in behalf of the State of Louisiana under the Internal Improvement Act of Sept. 4, 1841, prior to the Swamp Land Act of Mar. 2, 1849, but approved thereafter, is considered as appropriating the land and precluding the grant of swamplands to the State under the 1849 act, and a subsequent relinquishment of the State's claim under the 1841 act many years later cannot effectuate the grant under the Act of 1849 or the general Swamp Land Act of Sept. 28, 1850, since they are grants *in praesenti* operating upon facts as of their dates of the enactment, and do not apply to facts which have changed after their enactment.----- 148
2. Where the Bureau of Land Management has required a State, which filed a swampland selection, to contest a Federal oil and gas lease by establishing evidence at a hearing as to the character of the land at the date of the Swamp Land Act, the Department is not limited in its consideration of the State's application to the sole question of the character of the land at the date of the Swamp Land Act, but may also resolve any legal issues which will determine whether title should be approved in the State.----- 148

**WATER AND WATER RIGHTS**

**GENERALLY**

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1. The Department will not deny an application for a right-of-way to transport water from a mill site for use on a mining claim upon the basis of a protest that the use of the water will deplete the underground water available to agricultural users of such water where it appears that under the water law of the State (California) the agricultural users have a remedy at law to protect their interests; the Department will not adjudicate the water rights of the parties..... 172
2. A provision in an act of Congress giving the Secretary power to direct an exchange of mainstream Colorado River water for Gila River water with Arizona users and to offer the Gila River water so obtained to New Mexico users would not be in conflict with rights of Arizona and New Mexico as fixed in *Arizona v. California*.... 252
3. While New Mexico may not divert water from the Gila River in excess of the quantities decreed thereby without violating the *Arizona v. California* Decree, the United States is not restrained by that decree from acquiring and disposing of such water..... 253
4. The Congress possesses constitutional power to authorize a reclamation project involving the allocation and apportionment of tributary water of the Colorado River as well as of the mainstream of that river..... 253
5. Having lawfully acquired Gila River water, the United States can, at the direction of Congress, dispose of the water, through exchange, as part of a federal reclamation project..... 253

**WITHDRAWALS AND RESERVATIONS**

**GENERALLY**

1. A selection filed by the State of Alaska for lands granted to it by the Statehood Act which is accepted by the land office and posted on the public land records segregates the land from all appropriations based on settlement and location so long as it remains of record, despite the fact that the selected land was in a withdrawal at the time the State filed its selection..... 1

**WORDS AND PHRASES**

1. The term "producible well" means substantially the same as "well capable of producing in paying quantities" which, as applied to a gas well, is a well which at the very least is capable of producing in sufficient quantity to pay the lessee a profit, though small, over operating and marketing expenses, although it may never repay the cost of drilling the well..... 110
2. The term "cost of production," as used in a particular unit agreement and as applied to a gas well, includes the cost of pipe line construction and well connection which are required before the well can be produced..... 110
3. Lands within coal leases are considered to be "producible" within the meaning of Rev. Stat. sec 2276, as amended, where there is a well-defined and large deposit of coal outcropping on the land which can be easily strip-mined from the outcrops. State indemnity selections for such lands or for any other lands included in the leases are properly rejected..... 207



## WORDS AND PHRASES—Continued

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4. The term "improvements" includes any structures of a permanent nature placed upon land which tend to increase the value of land but excludes a house trailer or other mobile property which is not permanently affixed to the land.....	373
5. The term "assignment" as used in the act of Mar. 28, 1908, applies to a transfer to a corporation of the rights of a desert land entryman to enter upon the lands and remain in effective control thereof and to grow and harvest crops thereon for the benefit of the corporation.....	386
6. The terms "assignment," "hold" and "otherwise" as used in section 7 of the act of Mar. 3, 1891, are words of broad signification and their precise meanings depend on the context in which they are used.....	386
7. A corporation which has acquired actual possession, the right of actual possession to more than 320 acres of desert land "holds" such acreage within the meaning of the prohibition of section 7 of the act of Mar. 3, 1891.....	386